S. HRG. 106–569

FEDERAL RECOGNITION

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

S. 611

TO PROVIDE FOR ADMINISTRATIVE PROCEDURES TO EXTEND FEDERAL RECOGNITION TO CERTAIN INDIAN GROUPS

MAY 24, 2000
WASHINGTON, DC

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FEDERAL RECOGNITION

WEDNESDAY, MAY 24, 2000

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:30 p.m. in Room 485, Senate Russell Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell and Inouye.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee will come to order.

Today the committee will receive testimony on the Indian Federal Recognition Administrative Procedures Act of 1999, a bill I introduced in March 1999 to bring fairness and efficiency to the recognition process.

Recognition triggers a unique legal and political relationship between the United States and tribes and in the most practical sense makes the tribe eligible for Federal protection, services and monetary benefits.

Recognition occurs through either congressional action or through the agency process carried out by the Branch of Acknowledgement and Research [BAR] within the Bureau of Indian Affairs [BIA].

For as long as I have been in Congress, Indian petitioners and others have complained that the BAR is institutionally biased against recognizing new tribes, that the existing process is too expensive and time-consuming and that the process does not provide petitioning groups with due process.

This past March, one group filed a lawsuit seeking to compel the BAR to make a decision on its claim, which was first filed in 1989. The Assistant Secretary rightly recognizes that there are problems with the BAR's process.

In February 2000, the BIA proposed regulations to amend the current process with a goal of expediting decisions on these petitions.

The bill we will discuss today will revamp that process by establishing an independent three-member commission on Indian recognition which would sunset automatically after 12 years from the date of enactment.

Certainly, this bill, as all bills, is not perfect. We expect some criticism for it. The staff and I have read completely the testimony that has been turned in so far. I have to tell you that if you saw last night's CBS special, it was really related to the Pequot's success with the casino, but it was a very interesting thing to watch. I make no judgment as to how that process was done, but clearly people are beginning to ask questions and in some cases I understand they even want congressional hearings on how the process is done.

[Text of S. 611 follows:]

II

106TH CONGRESS
1ST SESSION

S. 611

To provide for administrative procedures to extend Federal recognition to certain Indian groups, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 15, 1999

Mr. CAMPBELL introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

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A BILL

To provide for administrative procedures to extend Federal recognition to certain Indian groups, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Indian Federal Recognition Administrative Procedures Act of 1999".

SEC. 2. PURPOSES.

The purposes of this Act are as follows:

(1) To establish an administrative procedure to extend Federal recognition to certain Indian groups.

(2) To extend to Indian groups that are determined to be Indian tribes the protection, services, and benefits available from the Federal Government pursuant to the Federal trust responsibility with respect to Indian tribes.

(3) To extend to Indian groups that are determined to be Indian tribes the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

(4) To ensure that when the Federal Government extends acknowledgment to an Indian tribe, the Federal Government does so with a consistent legal, factual, and historical basis.

(5) To establish a Commission on Indian Recognition to review and act upon petitions submitted by Indian groups that apply for Federal recognition.

(6) To provide clear and consistent standards of administrative review of documented petitions for Federal acknowledgment.

(7) To clarify evidentiary standards and expedite the administrative review process by providing adequate resources to process petitions.

(8) To remove the Federal acknowledgment process from the Bureau of Indian Affairs and transfer the responsibility for the process to an independent Commission on Indian Recognition.

SEC. 3. DEFINITIONS.

In this Act:

(1) ACKNOWLEDGED.—The term "acknowledged" means, with respect to an Indian group, that the Commission on Indian Recognition has made an acknowledgment, as defined in paragraph (2), for that group.

(2) ACKNOWLEDGMENT.—The term "acknowledgment" means a determination by the Commission on Indian Recognition that an Indian group—

(A) constitutes an Indian tribe with a government-to-government relationship with the United States; and

(B) with respect to which the members are recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) ALASKA NATIVE.—The term "Alaska Native" means an individual who is an Alaskan Indian, Eskimo, or Aleut, or any combination thereof.

(4) AUTONOMOUS.—

(A) IN GENERAL.—The term "autonomous" means the exercise of political influence or authority independent of the control of any other Indian governing entity.

(B) CONTEXT OF TERM.—With respect to a petitioner, that term shall be understood in the context of the history, geography, culture, and social organization of the petitioner.

(5) BUREAU.—The term "Bureau" means the Bureau of Indian Affairs of the Department.

(6) COMMISSION.—The term "Commission" means the Commission on Indian Recognition established under section 4.

(7) COMMUNITY.—

(A) IN GENERAL.—The term "community" means any group of people, living within a reasonable territorial that is able to demonstrate that—

(i) consistent interactions and significant social relationships exist within the membership; and

(ii) the members of that group are differentiated from and identified as distinct from nonmembers.

(B) CONTEXT OF TERM.—The term shall be understood in the context of the history, culture, and social organization of the group, taking into account the geography of the region in which the group resides.

(8) CONTINUOUS OR CONTINUOUSLY.—With respect to a period of history of a group, the term "continuous" or "continuously" means extending from the first sustained contact with Euro-Americans throughout the history of the group to the present substantially without interruption.

(9) DEPARTMENT.—The term "Department" means the Department of the Interior.

(10) DOCUMENTED PETITION.—The term "documented petition" means the detailed, factual exposition and arguments, including all documentary evidence, necessary to demonstrate that those arguments specifically address the mandatory criteria established in section 5.

(11) GROUP.—The term "group" means an Indian group, as defined in paragraph (13).

(12) HISTORICALLY, HISTORICAL, HISTORY.—The terms "historically", "historical", and "history" refer to the period dating from the first sustained contact with Euro-Americans.

(13) INDIAN GROUP.—The term "Indian group" means any Indian or Alaska Native band, pueblo, village or community within the United States that the Secretary does not acknowledge to be an Indian tribe.

(14) INDIAN TRIBE.—The term "Indian tribe" means any Indian or Alaska Native tribe, band, pueblo, village, or community within the United States that—

(A) the Secretary has acknowledged as an Indian tribe as of the date of enactment of this Act, or acknowledges to be an Indian tribe pursuant to the procedures applicable to certain petitions under active consideration at the time of the transfer of petitions to the Commission under section 5(a)(3); or

(B) the Commission acknowledges as an Indian tribe under this Act.

(15) INDIGENOUS.—With respect to a petitioner, the term "indigenous" means native to the United States, in that at least part of the traditional territory of the petitioner at the time of first sustained contact with Euro-Americans extended into the United States.

(16) LETTER OF INTENT.—The term "letter of intent" means an undocumented letter or resolution that—

(A) is dated and signed by the governing body of an Indian group;

(B) is submitted to the Commission; and

(C) indicates the intent of the Indian group to submit a petition for Federal acknowledgment.

(17) MEMBER OF AN INDIAN GROUP.—The term "member of an Indian group" means an individual who—

(A) is recognized by an Indian group as meeting the membership criteria of the Indian group; and

(B) consents in writing to being listed as a member of that group.

(18) MEMBER OF AN INDIAN TRIBE.—The term "member of an Indian tribe" means an individual who—

(A)(i) meets the membership requirements of the tribe as set forth in its governing document; or

(ii) in the absence of a governing document which sets out those requirements, has been

recognized as a member collectively by those persons comprising the tribal governing body; and

(B)(i) has consistently maintained tribal relations with the tribe; or

(ii) is listed on the tribal membership rolls as a member, if those rolls are kept.

(19) PETITION.—The term "petition" means a petition for acknowledgment submitted or transferred to the Commission pursuant to section 5.

(20) PETITIONER.—The term "petitioner" means any group that submits a letter of intent to the Commission requesting acknowledgment.

(21) POLITICAL INFLUENCE OR AUTHORITY.—

(A) IN GENERAL.—The term "political influence or authority" means a tribal council, leadership, internal process, or other mechanism that a group has used as a means of—

(i) influencing or controlling the behavior of its members in a significant manner;

(ii) making decisions for the group which substantially affect its members; or

(iii) representing the group in dealing with nonmembers in matters of consequence to the group.

(B) CONTEXT OF TERM.—The term shall be understood in the context of the history, culture, and social organization of the group.

(22) PREVIOUS FEDERAL ACKNOWLEDGMENT.—The term "previous Federal acknowledgment" means any action by the Federal Government, the character of which—

(A) is clearly premised on identification of a tribal political entity; and

(B) clearly indicates the recognition of a government-to-government relationship between that entity and the Federal Government.

(23) RESTORATION.—The term "restoration" means the reextension of acknowledgment to any previously acknowledged tribe with respect to which the acknowledged status may have been abrogated or diminished by reason of legislation enacted by Congress expressly terminating that status.

(24) SECRETARY.—The term "Secretary" means the Secretary of the Interior.

(25) SUSTAINED CONTACT.—The term "sustained contact" means the period of earliest sus-

tained Euro-American settlement or governmental presence in the local area in which the tribe or tribes from which the petitioner claims descent was located historically.

(26) TREATY.—The term "treaty" means any treaty—

(A) negotiated and ratified by the United States on or before March 3, 1871, with, or on behalf of, any Indian group or tribe;

(B) made by any government with, or on behalf of, any Indian group or tribe, from which the Federal Government subsequently acquired territory by purchase, conquest, annexation, or cession; or

(C) negotiated by the United States with, or on behalf of, any Indian group in California, whether or not the treaty was subsequently ratified.

(27) TRIBE.—The term "tribe" means an Indian tribe.

(28) TRIBAL RELATIONS.—The term "tribal relations" means participation by an individual in a political and social relationship with an Indian tribe.

(29) TRIBAL ROLL.—The term "tribal roll" means a list exclusively of those individuals who—

(A)(i) have been determined by the tribe to meet the membership requirements of the tribe, as set forth in the governing document of the tribe; or

(ii) in the absence of a governing document that sets forth those requirements, have been recognized as members by the governing body of the tribe; and

(B) have affirmatively demonstrated consent to being listed as members of the tribe.

(30) UNITED STATES.—The term "United States" means the 48 contiguous States, and the States of Alaska and Hawaii. The term does not include territories or possessions of the United States.

SEC. 4. COMMISSION ON INDIAN RECOGNITION.

(a) ESTABLISHMENT.—There is established, as an independent commission, the Commission on Indian Recognition. The Commission shall be an independent establishment, as defined in section 104 of title 5, United States Code.

(b) MEMBERSHIP.—

(1) IN GENERAL.—

(A) MEMBERS.—The Commission shall consist of 3 members appointed by the Presi-

dent, by and with the advice and consent of the Senate.

(B) INDIVIDUALS TO BE CONSIDERED FOR MEMBERSHIP.—In making appointments to the Commission, the President shall give careful consideration to—

(i) recommendations received from Indian tribes; and

(ii) individuals who have a background in Indian law or policy, anthropology, genealogy, or history.

(2) POLITICAL AFFILIATION.—Not more than 2 members of the Commission may be members of the same political party.

(3) TERMS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), each member of the Commission shall be appointed for a term of 4 years.

(B) INITIAL APPOINTMENTS.—As designated by the President at the time of appointment, of the members initially appointed under this subsection—

(i) 1 member shall be appointed for a term of 2 years;

(ii) 1 member shall be appointed for a term of 3 years; and

(iii) 1 member shall be appointed for a term of 4 years.

(4) VACANCIES.—Any vacancy in the Commission shall not affect the powers of the Commission, but shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of the member was appointed shall be appointed only for the remainder of that term. A member may serve after the expiration of the term of that member until a successor has taken office.

(5) COMPENSATION.—

(A) IN GENERAL.—Each member of the Commission shall receive compensation at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day, including traveltime, that member is engaged in the actual performance of duties authorized by the Commission.

(B) TRAVEL.—All members of the Commission shall be reimbursed for travel and per diem in lieu of subsistence expenses during the performance of duties of the Commission while away from their homes or regular places of business, in accordance with subchapter I of chapter 57 of title 5, United States Code.

(6) FULL-TIME EMPLOYMENT.—Each member of the Commission shall serve on the Commission as a full-time employee of the Federal Government. No member of the Commission may, while serving on the Commission, be otherwise employed as an officer or employee of the Federal Government. Service by a member who is an employee of the Federal Government at the time of nomination as a member shall be without interruption or loss of civil service status or privilege.

(7) CHAIRPERSON.—At the time appointments are made under paragraph (1), the President shall designate a Chairperson of the Commission (referred to in this section as the "Chairperson") from among the appointees.

(c) MEETINGS AND PROCEDURES.—

(1) IN GENERAL.—The Commission shall hold its first meeting not later than 30 days after the

date on which all members of the Commission have been appointed and confirmed by the Senate.

(2) QUORUM.—Two members of the Commission shall constitute a quorum for the transaction of business.

(3) RULES.—The Commission may adopt such rules (consistent with the provisions of this Act) as may be necessary to establish the procedures of the Commission and to govern the manner of operations, organization, and personnel of the Commission.

(4) PRINCIPAL OFFICE.—The principal office of the Commission shall be in the District of Columbia.

(d) DUTIES.—The Commission shall carry out the duties assigned to the Commission by this Act, and shall meet the requirements imposed on the Commission by this Act.

(e) POWERS AND AUTHORITIES.—

(1) POWERS AND AUTHORITIES OF CHAIRPERSON.—Subject to such rules and regulations as may be adopted by the Commission, the Chairperson may—

(A) appoint, terminate, and fix the compensation (without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without

regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title, or of any other provision of law, relating to the number, classification, and General Schedule rates) of an Executive Director of the Commission and of such other personnel as the Chairperson considers advisable to assist in the performance of the duties of the Commission, at a rate not to exceed a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of title 5, United States Code; and

(B) procure, as authorized by section 3109(b) of title 5, United States Code, temporary and intermittent services to the same extent as is authorized by law for agencies in the executive branch, but at rates not to exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of that title.

(2) GENERAL POWERS AND AUTHORITIES OF COMMISSION.—

(A) IN GENERAL.—The Commission may hold such hearings and sit and act at such

times as the Commission considers to be appropriate.

(B) OTHER AUTHORITIES.—As the Commission may consider advisable, the Commission may—

(i) take testimony;

(ii) have printing and binding done;

(iii) enter into contracts and other arrangements, subject to the availability of funds;

(iv) make expenditures; and

(v) take other actions.

(C) OATHS AND AFFIRMATIONS.—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(3) INFORMATION.—

(A) IN GENERAL.—The Commission may secure directly from any officer, department, agency, establishment, or instrumentality of the Federal Government such information as the Commission may require to carry out this Act. Each such officer, department, agency, establishment, or instrumentality shall furnish, to the extent permitted by law, such information,

suggestions, estimates, and statistics directly to the Commission, upon the request of the Chairperson.

(B) FACILITIES, SERVICES, AND DETAILS.—Upon the request of the Chairperson, to assist the Commission in carrying out the duties of the Commission under this section, the head of any Federal department, agency, or instrumentality may—

(i) make any of the facilities and services of that department, agency, or instrumentality available to the Commission; and

(ii) detail any of the personnel of that department, agency, or instrumentality to the Commission, on a nonreimbursable basis.

(C) MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

(f) FEDERAL ADVISORY COMMITTEE ACT.—The provisions of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

(g) TERMINATION OF COMMISSION.—The Commission shall terminate on the date that is 12 years after the date of enactment of this Act.

SEC. 5. PETITIONS FOR RECOGNITION.

(a) IN GENERAL.—

(1) PETITIONS.—Subject to subsection (d) and except as provided in paragraph (2), any Indian group may submit to the Commission a petition requesting that the Commission recognize an Indian group as an Indian tribe.

(2) EXCLUSION.—The following groups and entities shall not be eligible to submit a petition for recognition by the Commission under this Act:

(A) CERTAIN ENTITIES THAT ARE ELIGIBLE TO RECEIVE SERVICES FROM THE BUREAU.—Indian tribes, organized bands, pueblos, communities, and Alaska Native entities that are recognized by the Secretary as of the date of enactment of this Act as eligible to receive services from the Bureau.

(B) CERTAIN SPLINTER GROUPS, POLITICAL FACTIONS, AND COMMUNITIES.—Splinter groups, political factions, communities, or groups of any character that separate from the main body of an Indian tribe that, at the time

of that separation, is recognized as an Indian tribe by the Secretary, unless the group, faction, or community is able to establish clearly that the group, faction, or community has functioned throughout history until the date of that petition as an autonomous Indian tribal entity.

(C) CERTAIN GROUPS THAT HAVE PREVIOUSLY SUBMITTED PETITIONS.—Groups, or successors in interest of groups, that before the date of enactment of this Act, have petitioned for and been denied or refused recognition as an Indian tribe under regulations prescribed by the Secretary.

(D) INDIAN GROUPS SUBJECT TO TERMINATION.—Any Indian group whose relationship with the Federal Government was expressly terminated by an Act of Congress.

(E) PARTIES TO CERTAIN ACTIONS.—Any Indian group that—

(i) in any action in a United States court of competent jurisdiction to which the group was a party, attempted to establish its status as an Indian tribe or a successor in interest to an Indian tribe that

was a party to a treaty with the United States;

(ii) was determined by that court—

(I) not to be an Indian tribe; or

(II) not to be a successor in interest to an Indian tribe that was a party to a treaty with the United States; or

(iii) was the subject of findings of fact by that court which, if made by the Commission, would show that the group was incapable of establishing 1 or more of the criteria set forth in this section.

(3) TRANSFER OF PETITION.—

(A) IN GENERAL.—Notwithstanding any other provision of law, not later than 30 days after the date on which all of the members of the Commission have been appointed and confirmed by the Senate under section 4(b), the Secretary shall transfer to the Commission all petitions pending before the Department that—

(i) are not under active consideration by the Secretary at the time of the transfer; and

(ii) request the Secretary, or the Federal Government, to recognize or acknowledge an Indian group as an Indian tribe.

(B) CESSATION OF CERTAIN AUTHORITIES OF SECRETARY.—Notwithstanding any other provision of law, on the date of the transfer under subparagraph (A), the Secretary and the Department shall cease to have any authority to recognize or acknowledge, on behalf of the Federal Government, any Indian group as an Indian tribe, except for those groups under active consideration at the time of the transfer whose petitions have been retained by the Secretary pursuant to subparagraph (A).

(C) DETERMINATION OF ORDER OF SUBMISSION OF TRANSFERRED PETITIONS.—Petitions transferred to the Commission under subparagraph (A) shall, for purposes of this Act, be considered as having been submitted to the Commission in the same order as those petitions were submitted to the Department.

(b) PETITION FORM AND CONTENT.—Except as provided in subsection (c), any petition submitted under subsection (a) by an Indian group shall be in any readable form that clearly indicates that the petition is a petition

requesting the Commission to recognize the Indian group as an Indian tribe and that contains detailed, specific evidence concerning each of the following items:

(1) STATEMENT OF FACTS.—A statement of facts establishing that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1871. Evidence that the character of the group as an Indian entity has from time to time been denied shall not be considered to be conclusive evidence that this criterion has not been met. Evidence that the Commission may rely on in determining the Indian identity of a group may include any 1 or more of the following items:

(A) IDENTIFICATION OF PETITIONER.—An identification of the petitioner as an Indian entity by any department, agency, or instrumentality of the Federal Government.

(B) RELATIONSHIP OF PETITIONER WITH STATE GOVERNMENT.—A relationship between the petitioner and any State government, based on an identification of the petitioner as an Indian entity.

(C) RELATIONSHIP OF PETITIONER WITH A POLITICAL SUBDIVISION OF A STATE.—Dealings of the petitioner with a county or political

subdivision of a State in a relationship based on the Indian identity of the petitioner.

(D) IDENTIFICATION OF PETITIONER ON THE BASIS OF CERTAIN RECORDS.—An identification of the petitioner as an Indian entity by records in a private or public archive, courthouse, church, or school.

(E) IDENTIFICATION OF PETITIONER BY CERTAIN EXPERTS.—An identification of the petitioner as an Indian entity by an anthropologist, historian, or other scholar.

(F) IDENTIFICATION OF PETITIONER BY CERTAIN MEDIA.—An identification of the petitioner as an Indian entity in a newspaper, book, or similar medium.

(G) IDENTIFICATION OF PETITIONER BY ANOTHER INDIAN TRIBE OR ORGANIZATION.—An identification of the petitioner as an Indian entity by another Indian tribe or by a national, regional, or State Indian organization.

(H) IDENTIFICATION OF PETITIONER BY A FOREIGN GOVERNMENT OR INTERNATIONAL ORGANIZATION.—An identification of the petitioner as an Indian entity by a foreign government or an international organization.

(I) OTHER EVIDENCE OF IDENTIFICATION.—Such other evidence of identification as may be provided by a person or entity other than the petitioner or a member of the membership of the petitioner.

(2) EVIDENCE OF COMMUNITY.—

(A) IN GENERAL.—A statement of facts establishing that a predominant portion of the membership of the petitioner—

(i) comprises a community distinct from those communities surrounding that community; and

(ii) has existed as a community from historical times to the present.

(B) EVIDENCE.—Evidence that the Commission may rely on in determining that the petitioner meets the criterion described in clauses (i) and (ii) of subparagraph (A) may include 1 or more of the following items:

(i) MARRIAGES.—Significant rates of marriage within the group, or, as may be culturally required, patterned out-marriages with other Indian populations.

(ii) SOCIAL RELATIONSHIPS.—Significant social relationships connecting individual members.

(iii) SOCIAL INTERACTION.—Significant rates of informal social interaction which exist broadly among the members of a group.

(iv) SHARED ECONOMIC ACTIVITY.—A significant degree of shared or cooperative labor or other economic activity among the membership.

(v) DISCRIMINATION OR OTHER SOCIAL DISTINCTIONS.—Evidence of strong patterns of discrimination or other social distinctions by nonmembers.

(vi) SHARED RITUAL ACTIVITY.—Shared sacred or secular ritual activity encompassing most of the group.

(vii) CULTURAL PATTERNS.—Cultural patterns that—

(I) are shared among a significant portion of the group that are different from the cultural patterns of the non-Indian populations with whom the group interacts;

(II) function as more than a symbolic identification of the group as Indian; and

(III) may include language, kinship or religious organizations, or religious beliefs and practices.

(viii) COLLECTIVE INDIAN IDENTITY.—The persistence of a named, collective Indian identity continuously over a period of more than 50 years, notwithstanding changes in name.

(ix) HISTORICAL POLITICAL INFLUENCE.—A demonstration of historical political influence pursuant to the criterion set forth in paragraph (3).

(C) CRITERIA FOR SUFFICIENT EVIDENCE.—The Commission shall consider the petitioner to have provided sufficient evidence of community at a given point in time if the petitioner has provided evidence that demonstrates any one of the following:

(i) RESIDENCE OF MEMBERS.—More than 50 percent of the members of the group of the petitioner reside in a particular geographical area exclusively or almost

exclusively composed of members of the group, and the balance of the group maintains consistent social interaction with some members of the community.

(ii) MARRIAGES.—Not less than 50 percent of the marriages of the group are between members of the group.

(iii) DISTINCT CULTURAL PATTERNS.—Not less than 50 percent of the members of the group maintain distinct cultural patterns including language, kinship or religious organizations, or religious beliefs or practices.

(iv) COMMUNITY SOCIAL INSTITUTIONS.—Distinct community social institutions encompassing a substantial portion of the members of the group, such as kinship organizations, formal or informal economic cooperation, or religious organizations.

(v) APPLICABILITY OF CRITERIA.—The group has met the criterion in paragraph (3) using evidence described in paragraph (3)(B).

(3) AUTONOMOUS ENTITY.—

(A) IN GENERAL.—A statement of facts establishing that the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the time of the petition. The Commission may rely on 1 or more of the following items in determining whether a petitioner meets the criterion described in the preceding sentence:

(i) MOBILIZATION OF MEMBERS.—The group is capable of mobilizing significant numbers of members and significant resources from its members for group purposes.

(ii) ISSUES OF PERSONAL IMPORTANCE.—Most of the membership of the group consider issues acted upon or taken by group leaders or governing bodies to be of personal importance.

(iii) POLITICAL PROCESS.—There is a widespread knowledge, communication, and involvement in political processes by most of the members of the group.

(iv) LEVEL OF APPLICATION OF CRITERIA.—The group meets the criterion de-

scribed in paragraph (2) at more than a minimal level.

(v) INTRAGROUP CONFLICTS.—There are intragroup conflicts which show controversy over valued group goals, properties, policies, processes, or decisions.

(B) EVIDENCE OF EXERCISE OF POLITICAL INFLUENCE OR AUTHORITY.—The Commission shall consider that a petitioner has provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders or other mechanisms exist or have existed that accomplish the following:

(i) ALLOCATION OF GROUP RESOURCES.—Allocate group resources such as land, residence rights, or similar resources on a consistent basis.

(ii) SETTLEMENT OF DISPUTES.—Settle disputes between members or subgroups such as clans or moieties by mediation or other means on a regular basis.

(iii) INFLUENCE ON BEHAVIOR OF INDIVIDUAL MEMBERS.—Exert strong influence on the behavior of individual mem-

bers, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior.

(iv) ECONOMIC SUBSISTENCE ACTIVITIES.—Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(C) TEMPORALITY OF SUFFICIENCY OF EVIDENCE.—A group that has met the requirements of paragraph (2)(C) at any point in time shall be considered to have provided sufficient evidence to meet the criterion described in subparagraph (A) at that point in time.

(4) GOVERNING DOCUMENT.—A copy of the then present governing document of the petitioner that includes the membership criteria of the petitioner. In the absence of a written document, the petitioner shall be required to provide a statement describing in full the membership criteria of the petitioner and the then current governing procedures of the petitioner.

(5) LIST OF MEMBERS.—

(A) IN GENERAL.—A list of all then current members of the petitioner, including the full name (and maiden name, if any), date, and

place of birth, and then current residential address of each member, a copy of each available former list of members based on the criteria defined by the petitioner, and a statement describing the methods used in preparing those lists.

(B) REQUIREMENTS FOR MEMBERSHIP.—In order for the Commission to consider the members of the group to be members of an Indian tribe for the purposes of the petition, that membership shall be required to consist of established descendancy from an Indian group that existed historically, or from historical Indian groups that combined and functioned as a single autonomous entity.

(C) EVIDENCE OF TRIBAL MEMBERSHIP.—Evidence of tribal membership required by the Commission for a determination of tribal membership shall include the following items:

(i) DESCENDANCY ROLLS.—Descendancy rolls prepared by the Secretary for the petitioner for purposes of distributing claims money, providing allotments, or other purposes.

(ii) CERTAIN OFFICIAL RECORDS.—Federal, State, or other official records or

evidence identifying then present members of the petitioner, or ancestors of then present members of the petitioner, as being descendants of a historic tribe or historic tribes that combined and functioned as a single autonomous political entity.

(iii) ENROLLMENT RECORDS.—Church, school, and other similar enrollment records identifying then present members or ancestors of then present members as being descendants of a historic tribe or historic tribes that combined and functioned as a single autonomous political entity.

(iv) AFFIDAVITS OF RECOGNITION.—Affidavits of recognition by tribal elders, leaders, or the tribal governing body identifying then present members or ancestors of then present members as being descendants of 1 or more historic tribes that combined and functioned as a single autonomous political entity.

(v) OTHER RECORDS OR EVIDENCE.—Other records or evidence identifying then present members or ancestors of then

present members as being descendants of 1 or more historic tribes that combined and functioned as a single autonomous political entity.

(c) EXCEPTIONS.—A petition from an Indian group that is able to demonstrate by a preponderance of the evidence that the group was, or is the successor in interest to, a—

(1) party to a treaty or treaties;

(2) group acknowledged by any agency of the Federal Government as eligible to participate under the Act of June 18, 1934 (commonly referred to as the "Indian Reorganization Act") (48 Stat. 984 et seq., chapter 576; 25 U.S.C. 461 et seq.);

(3) group for the benefit of which the United States took into trust lands, or which the Federal Government has treated as having collective rights in tribal lands or funds; or

(4) group that has been denominated a tribe by an Act of Congress or Executive order,

shall be required to establish the criteria set forth in this section only with respect to the period beginning on the date of the applicable action described in paragraph (1), (2), (3), or (4) and ending on the date of submission of the petition.

(d) DEADLINE FOR SUBMISSION OF PETITIONS.—No Indian group may submit a petition to the Commission requesting that the Commission recognize an Indian group as an Indian tribe after the date that is 8 years after the date of enactment of this Act. After the Commission makes a determination on each petition submitted before that date, the Commission may not make any further determination under this Act to recognize any Indian group as an Indian tribe.

SEC. 6. NOTICE OF RECEIPT OF PETITION.

(a) PETITIONER.—

(1) IN GENERAL.—Not later than 30 days after a petition is submitted or transferred to the Commission under section 5(a), the Commission shall—

(A) send an acknowledgement of receipt in writing to the petitioner; and

(B) publish in the Federal Register a notice of that receipt, including the name, location, and mailing address of the petitioner and such other information that—

(i) identifies the entity that submitted the petition and the date the petition was received by the Commission;

(ii) indicates where a copy of the petition may be examined; and

(iii) indicates whether the petition is a transferred petition that is subject to the special provisions under paragraph (2).

(2) SPECIAL PROVISIONS FOR TRANSFERRED PETITIONS.—

(A) IN GENERAL.—With respect to a petition that is transferred to the Commission under section 5(a)(3), the notice provided to the petitioner, shall, in addition to providing the information specified in paragraph (1), inform the petitioner whether the petition constitutes a documented petition that meets the requirements of section 5.

(B) AMENDED PETITIONS.—If the petition described in subparagraph (A) is not a documented petition, the Commission shall notify the petitioner that the petitioner may, not later than 90 days after the date of the notice, submit to the Commission an amended petition that is a documented petition for review under section 7.

(C) EFFECT OF AMENDED PETITION.—To the extent practicable, the submission of an amended petition by a petitioner by the date specified in this paragraph shall not affect the

order of consideration of the petition by the Commission.

(b) OTHERS.—In addition to providing the notification required under subsection (a), the Commission shall notify, in writing, the Governor and attorney general of, and each federally recognized Indian tribe within, any State in which a petitioner resides.

(c) PUBLICATION; OPPORTUNITY FOR SUPPORTING OR OPPOSING SUBMISSIONS.—

(1) PUBLICATION.—The Commission shall publish the notice of receipt of each petition (including any amended petition submitted pursuant to subsection (a)(2)) in a major newspaper of general circulation in the town or city located nearest the location of the petitioner.

(2) OPPORTUNITY FOR SUPPORTING OR OPPOSING SUBMISSIONS.—

(A) IN GENERAL.—Each notice published under paragraph (1) shall include, in addition to the information described in subsection (a), notice of opportunity for other parties to submit factual or legal arguments in support of or in opposition to, the petition.

(B) COPY TO PETITIONER.—A copy of any submission made under subparagraph (A) shall

be provided to the petitioner upon receipt by the Commission.

(C) RESPONSE.—The petitioner shall be provided an opportunity to respond to any submission made under subparagraph (A) before a determination on the petition by the Commission.

SEC. 7. PROCESSING THE PETITION.

(a) REVIEW.—

(1) IN GENERAL.—Upon receipt of a documented petition submitted or transferred under section 5(a) or submitted under section 6(a)(2)(B), the Commission shall conduct a review to determine whether the petitioner is entitled to be recognized as an Indian tribe.

(2) CONTENT OF REVIEW.—The review conducted under paragraph (1) shall include consideration of the petition, supporting evidence, and the factual statements contained in the petition.

(3) OTHER RESEARCH.—In conducting a review under this subsection, the Commission may—

(A) initiate other research for any purpose relative to analyzing the petition and obtaining additional information about the status of the petitioner; and

(B) consider such evidence as may be submitted by other parties.

(4) ACCESS TO LIBRARY OF CONGRESS AND NATIONAL ARCHIVES.—Upon request by the petitioner, the appropriate officials of the Library of Congress and the National Archives shall allow access by the petitioner to the resources, records, and documents of those entities, for the purpose of conducting research and preparing evidence concerning the status of the petitioner.

(b) CONSIDERATION.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, petitions submitted or transferred to the Commission shall be considered on a first come, first served basis, determined by the date of the original filing of each such petition with the Commission (or the Department if the petition is transferred to the Commission pursuant to section 5(a) or is an amended petition submitted pursuant to section 6(a)(2)(B)). The Commission shall establish a priority register that includes petitions that are pending before the Department on the date of enactment of this Act.

(2) PRIORITY CONSIDERATION.—Each petition (that is submitted or transferred to the Commission

pursuant to section 5(a) or that is submitted to the Commission pursuant to section 6(a)(2)(B)) of an Indian group that meets 1 or more of the requirements set forth in section 5(c) shall receive priority consideration over a petition submitted by any other Indian group.

SEC. 8. PRELIMINARY HEARING.

(a) IN GENERAL.—Not later than 60 days after the receipt of a documented petition by the Commission submitted or transferred under section 5(a) or submitted to the Commission pursuant to section 6(a)(2)(B), the Commission shall set a date for a preliminary hearing. At the preliminary hearing, the petitioner and any other concerned party may provide evidence concerning the status of the petitioner.

(b) DETERMINATION.—

(1) IN GENERAL.—Not later than 30 days after the conclusion of a preliminary hearing under subsection (a), the Commission shall make a determination—

(A) to extend Federal acknowledgment of the petitioner as an Indian tribe to the petitioner; or

(B) that provides that the petitioner should proceed to an adjudicatory hearing.

(2) NOTICE OF DETERMINATION.—The Commission shall publish in the Federal Register a notice of each determination made under paragraph (1).

(c) INFORMATION TO BE PROVIDED PREPARATORY TO AN ADJUDICATORY HEARING.—

(1) IN GENERAL.—If the Commission makes a determination under subsection (b)(1)(B) that the petitioner should proceed to an adjudicatory hearing, the Commission shall—

(A)(i) make available appropriate evidentiary records of the Commission to the petitioner to assist the petitioner in preparing for the adjudicatory hearing; and

(ii) include such guidance as the Commission considers necessary or appropriate to assist the petitioner in preparing for the hearing; and

(B) not later than 30 days after the conclusion of the preliminary hearing under subsection (a), provide a written notification to the petitioner that includes a list of any deficiencies or omissions that the Commission relied on in making a determination under subsection (b)(1)(B).

(2) SUBJECT OF ADJUDICATORY HEARING.—The list of deficiencies and omissions provided by the Commission to a petitioner under paragraph (1)(B) shall be the subject of the adjudicatory hearing. The Commission may not make any additions to the list after the Commission issues the list.

SEC. 9. ADJUDICATORY HEARING.

(a) IN GENERAL.—Not later than 180 days after the conclusion of a preliminary hearing under section 8(a), the Commission shall afford a petitioner who is subject to section 8(b)(1)(B) an adjudicatory hearing. The subject of the adjudicatory hearing shall be the list of deficiencies and omissions provided under section 8(c)(1)(B) and shall be conducted pursuant to section 554 of title 5, United States Code.

(b) TESTIMONY FROM STAFF OF COMMISSION.—In any hearing held under subsection (a), the Commission may require testimony from the acknowledgement and research staff of the Commission or other witnesses. Any such testimony shall be subject to cross-examination by the petitioner.

(c) EVIDENCE BY PETITIONER.—In any hearing held under subsection (a), the petitioner may provide such evidence as the petitioner considers appropriate.

(d) DETERMINATION BY COMMISSION.—Not later than 60 days after the conclusion of any hearing held under subsection (a), the Commission shall—

(1) make a determination concerning the extension or denial of Federal acknowledgment of the petitioner as an Indian tribe to the petitioner;

(2) publish the determination of the Commission under paragraph (1) in the Federal Register; and

(3) deliver a copy of the determination to the petitioner, and to every other interested party.

SEC. 10. APPEALS.

(a) IN GENERAL.—Not later than 60 days after the date that the Commission publishes a determination under section 9(d), the petitioner may appeal the determination to the United States District Court for the District of Columbia.

(b) ATTORNEY FEES.—If the petitioner prevails in an appeal made under subsection (a), the petitioner shall be eligible for an award of reasonable attorney fees and costs under section 504 of title 5, United States Code, or section 2412 of title 28, United States Code, whichever is applicable.

SEC. 11. EFFECT OF DETERMINATIONS.

A determination by the Commission under section 9(d) that an Indian group is recognized by the Federal Government as an Indian tribe shall not have the effect of depriving or diminishing—

(1) the right of any other Indian tribe to govern the reservation of such other tribe as that reservation existed before the recognition of that Indian group, or as that reservation may exist thereafter;

(2) any property right held in trust or recognized by the United States for that other Indian tribe as that property existed before the recognition of that Indian group; or

(3) any previously or independently existing claim by a petitioner to any such property right held in trust by the United States for that other Indian tribe before the recognition by the Federal Government of that Indian group as an Indian tribe.

SEC. 12. IMPLEMENTATION OF DECISIONS.

(a) ELIGIBILITY FOR SERVICES AND BENEFITS.—

(1) IN GENERAL.—Subject to paragraph (2), upon recognition by the Commission of a petitioner as an Indian tribe under this Act, the Indian tribe shall—

(A) be eligible for the services and benefits from the Federal Government that are available

to other federally recognized Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; and

(B) have the responsibilities, obligations, privileges, and immunities of those Indian tribes.

(2) PROGRAMS OF THE BUREAU.—

(A) IN GENERAL.—The recognition of an Indian group as an Indian tribe by the Commission under this Act shall not create an immediate entitlement to programs of the Bureau in existence on the date of the recognition.

(B) AVAILABILITY OF PROGRAMS.—

(i) IN GENERAL.—The programs described in subparagraph (A) shall become available to the Indian tribe upon the appropriation of funds.

(ii) REQUESTS FOR APPROPRIATIONS.—The Secretary and the Secretary of Health and Human Services shall forward budget requests for funding the programs for the Indian tribe pursuant to the needs determination procedures established under subsection (b).

(b) NEEDS DETERMINATION AND BUDGET REQUEST.—

(1) IN GENERAL.—Not later than 180 days after an Indian group is recognized by the Commission as an Indian tribe under this Act, the appropriate officials of the Bureau and the Indian Health Service of the Department of Health and Human Services shall consult and develop in cooperation with the Indian tribe, and forward to the Secretary or the Secretary of Health and Human Services, as appropriate, a determination of the needs of the Indian tribe and a recommended budget required to serve the newly recognized Indian tribe.

(2) SUBMISSION OF BUDGET REQUEST.—Upon receipt of the information described in paragraph (1), the appropriate Secretary shall submit to the President a recommended budget along with recommendations, concerning the information received under paragraph (1), for inclusion in the annual budget submitted by the President to the Congress pursuant to section 1108 of title 31, United States Code.

SEC. 13. ANNUAL REPORT CONCERNING COMMISSION'S ACTIVITIES.

(a) LIST OF RECOGNIZED TRIBES.—Not later than 90 days after the first meeting of the Commission, and annually on or before each January 30 thereafter, the Commission shall publish in the Federal Register a list of all Indian tribes that—

(1) are recognized by the Federal Government; and

(2) receive services from the Bureau.

(b) ANNUAL REPORT.—

(1) IN GENERAL.—Beginning on the date that is 1 year after the date of enactment of this Act, and annually thereafter, the Commission shall prepare and submit a report to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives that describes the activities of the Commission.

(2) CONTENT OF REPORTS.—Each report submitted under this subsection shall include, at a minimum, for the year that is the subject of the report—

(A) the number of petitions pending at the beginning of the year and the names of the petitioners;

(B) the number of petitions received during the year and the names of the petitioners;

(C) the number of petitions the Commission approved for acknowledgment during the year and the names of the acknowledged petitioners;

(D) the number of petitions the Commission denied for acknowledgment during the year and the names of the petitioners; and

(E) the status of all pending petitions on the date of the report and the names of the petitioners.

SEC. 14. ACTIONS BY PETITIONERS FOR ENFORCEMENT.

Any petitioner may bring an action in the district court of the United States for the district in which the petitioner resides, or the United States District Court for the District of Columbia, to enforce the provisions of this Act, including any time limitations within which actions are required to be taken, or decisions made, under this Act. The district court shall issue such orders (including writs of mandamus) as may be necessary to enforce the provisions of this Act.

SEC. 15. REGULATIONS.

The Commission may, in accordance with applicable requirements of title 5, United States Code, promulgate and publish such regulations as may be necessary to carry out this Act.

SEC. 16. GUIDELINES AND ADVICE.

(a) GUIDELINES.—Not later than 90 days after the date of enactment of this Act, the Commission shall make available to Indian groups suggested guidelines for the format of petitions, including general suggestions and guidelines concerning where and how to research information that is required to be included in a petition. The examples included in the guidelines shall not preclude the use of any other appropriate format.

(b) RESEARCH ADVICE.—The Commission may, upon request, provide suggestions and advice to any petitioner with respect to the research of the petitioner concerning the historical background and Indian identity of that petitioner. The Commission shall not be responsible for conducting research on behalf of the petitioner.

SEC. 17. ASSISTANCE TO PETITIONERS.

(a) GRANTS.—

(1) IN GENERAL.—The Secretary of Health and Human Services may award grants to Indian groups seeking Federal recognition as Indian tribes to enable the Indian groups to—

(A) conduct the research necessary to substantiate petitions under this Act; and

(B) prepare documentation necessary for the submission of a petition under this Act.

(2) TREATMENT OF GRANTS.—The grants made under this subsection shall be in addition to any other grants the Secretary of Health and Human Services is authorized to provide under any other provision of law.

(b) COMPETITIVE AWARD.—The grants made under subsection (a) shall be awarded competitively on the basis of objective criteria prescribed in regulations promulgated by the Secretary of Health and Human Services.

SEC. 18. AUTHORIZATION OF APPROPRIATIONS.

(a) COMMISSION.—There are authorized to be appropriated to the Commission to carry out this Act (other than section 17) such sums as are necessary for each of fiscal years 2001 through 2009.

(b) SECRETARY OF HHS.—To carry out section 17, there are authorized to be appropriated to the Department of Health and Human Services for the Administration for Native Americans such sums as are necessary for each of fiscal years 2001 through 2009.

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The CHAIRMAN. So with that, I would like to turn it over the Senator Inouye. I might tell you up front, though, we have been notified that we will have as many as six votes starting at 3 p.m., which means we have roughly 40 minutes to get through this as well as we can, or have to ask you all to stick around here for about 2 more hours after it is over to come back. I doubt if most of you want to do that.

Certainly, Senator Inouye and I recognize the difficulty that places on people that have planes or transportation out of town before the rush hour starts.

When we get going, I will ask you if you could limit your testimony to 5 minutes each. That will give us one-half hour or so of testimony.

We will ask what questions we can. We will take all your written testimony in the record and we will probably ask more questions in writing.

With that, Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. I thank you very much. I wish to commend you for scheduling this hearing.

For far too many years we have been receiving reports concerning the Federal acknowledgement process and the inordinate length of time it takes to have a petition processed by the BAR.

A criteria that is consistently applied is a source of much concern to me, that criteria which requires a tribe to prove a continuous political existence.

Upon initial review, one might observe that it is a perfectly reasonable criteria.

But when you consider the history of this Nation's treatment of the native people, the fact that at one point in our history we forced tribes to abandon their traditional homelands or disband, or that our laws made it a crime for Indian people to continue to associate in a tribal form, I think we can see that this requirement is hypocritical, to say the least.

If by virtue of the U.S. Government's action and policy this Nation precluded tribes from having a continuous political existence, how can we now, in all clear conscience, now demand that a tribe prove that it violated Federal law by continuing to exist as a community and continuing to exercise political influence over its members from historical times to the present?

Whatever the new organizational form a new entity to provide for the Federal recognition of petitioning tribes may take, I believe that we will not be able to effect any real change in the process until there are adequate resources provided to address the number of petitions that are now pending before the BIA.

The frustrations of tribal groups who have acknowledgement petitions pending are regularly communicated to this committee. The time for change is long overdue.

I would hope that the Indian country can come together and support either the bill introduced in the House by Congressman Faleomavaega or by the Chairman's bill so that we can begin to come to closure on reform of the Federal acknowledgement process.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Inouye.

With that we will start with Kevin Gover. I would remind everybody that we have unfortunate limited time. We don't have control of that, as most people here know. So if you would abbreviate your comments to about 5 minutes, we will probably submit most of our questions to you in writing.

Mr. Assistant Secretary.

STATEMENT OF HON. KEVIN GOVER, ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY LORETTA TUELL, DIRECTOR, AMERICAN INDIAN TRUST

Mr. GOVER. Thank you, Mr. Chairman. I will be brief. We submitted a written statement for the record. I would ask that the committee include that in the record.

Let me be brief. This is an extremely important matter as Senator Inouye pointed out, we are looking to right historical wrongs. People who have been mistreated by the United States, the fact that they are not among the family of federally-recognized Indian tribes is not to their discredit, but rather to ours, as the officials of the United States.

I have grown increasingly unhappy over my time here in our efforts to try to find a better way to address these petitions, to the point that I have reluctantly reached the conclusion that I will not be successful in trying to reform this process.

We have worked with the BAR and I am accompanied by Loretta Tuell, the director of the Office of American Indian Trust, who I asked to work with the BAR for several months. In fact, she was acting as the director of tribal services to really focus on new ways to approach these petitions to see if we couldn't speed up the process.

I think it is fair to say that even after our best efforts that we are not going to be able to do better than we have for the last few years.

To some degree it is a matter of resources. But as we look at our budget on an annual basis, it is very difficult for us in making our budget decisions to prioritize the BAR vis-a-vis the crying needs that exist elsewhere in Indian country, in our schools, in our police departments, and of course, in our trust programs.

I fear that BAR will never become a priority of any future Administration within the budget constraints that we have to operate.

Therefore, the commission idea begins to make some sense in terms of at least reducing the competition of this activity against the other great needs that exist in Indian country.

Obviously, these petitions have taken us too long to process. As you noted, in February I issued some new guidance that was intended to try to speed this process up, to reduce the amount of time that the BAR staff spent in researching these petitions, to rely much more on the submissions of the petitioners, rather than our own independent research, and to really try to expedite the ultimate decisionmaking.

While we have made some progress in the last few months, I don't think it is enough progress. I have little confidence that any

new enthusiasm or certainly any new speed that we have accomplished is going to be continued after my time in this office is gone.

I am also wrestling right now with some petitions that raise the precise issue that Senator Inouye was describing about the continuous political existence.

I ask myself exactly the same question. What are we to do in circumstances where the United States has very deliberately repressed the political existence of different groups as Indian tribes or otherwise denied them their rights?

Are we now going to impose an unreasonable standard that they have existed continuously as a political entity throughout their history?

I don't have a good answer to that right now. I am struggling with it on some specific petitions and we will attempt to address it. But I believe that that is an appropriate question, actually, for the Congress to answer.

Our authority as the executive branch is merely to recognize tribes that already exist. We do not have the authority, unlike the Congress, to create new tribes. We can only acknowledge those that already exist and meet the seven criteria which we have created based on various court decisions that had been made prior to the issuance of the BAR regulations.

Congress, it seems to me, has broader authority than we do. We think there are circumstances where our regulations are inadequate to meet the needs of a particular petitioner and that the Congress ought to examine those circumstances and give us, either us or a new entity, some guidance on how to handle them.

Finally, I have grown increasingly disturbed over the nature of these proceedings; 10 years ago, Federal recognition meant much less than it does now. It meant eligibility for BIA and IHS services. It meant eligibility for a few other programs that are limited to federally recognized tribes. It meant a great deal in terms of tribal authority and tribal sovereignty. But no one anticipated, when these BAR regulations were created, the kinds of money stakes that would be in play when we make these decisions.

I am very concerned with the effect of money on this process, on the fact that certain petitioners are backed by an enormous amount of money that can obscure rather than assist us in finding what the truth is.

I am concerned that those petitioners who are not backed, who do not have that sort of financial backing will ever find justice in a process that is becoming increasingly difficult, expensive, and lengthy.

So, on behalf of the department, we encourage the committee to mark up this bill and to work on it. We will work with you to try to address some of the relatively minor issues that we have identified in the bill. But I do think it is time that the Congress seriously consider an alternative to the process that we have been pursuing for the last dozen or so years.

With that, Mr. Chairman, I will be happy to answer any questions that the committee might have.

[Prepared statement of Mr. Gover appears in appendix.]

The CHAIRMAN. Thank you, Mr. Assistant Secretary. I am going to submit my questions in writing to you. I have about six of them

dealing with some of the terminated tribes, about some proposed regulations, about how we increase staff capacity, and things of that nature.

But, very clearly, you hit it right on the head that most of the problem we face now, in my view, is the introduction of huge amounts of money, some of it coming from the potential of a casino, of gaming.

Around here, you know as well as I do, if you can hire the right number of lobbyists, you get an awful lot done here. It seems to me that fairness ought to be driving it and not finances. But that is maybe for another day.

With that, Senator Inouye, did you have any questions?

Senator INOUYE. I have just one question.

What is your backlog?

Mr. GOVER. Oh, my.

Loretta.

Ms. TUELL. We have 14 on active consideration, 11 waiting to go to active consideration, and 166 petition letters. So our backlog is somewhere between 166 and 177.

Mr. GOVER. I would add that we are addressing these at a pace of between two and four a year. So we are literally looking at 50 years at the current pace to address all of the existing petitions.

Senator INOUYE. So your backlog is over 130?

Mr. GOVER. Yes, Senator Inouye; it is 130 groups that want tribal recognition?

I should clarify. The first 25 or so that Loretta talked about are very serious petitions. We have said they are ready, they are either on active consideration or they are ready.

There are another 166 where we have received letters from groups that tell us they intend to file complete petitions. Many of those will be frivolous. But we have no way, of course, without getting further into the process to know how many of them are frivolous.

Technically speaking, we have in the neighborhood of 200 petitions and we have no fair estimate of how many of those are serious.

Senator INOUYE. And your staff is sufficient to handle this?

Mr. GOVER. No, sir; we are short staffed. We have, 11 people in the BAR. I believe the BAR functions inefficiently. I also believe, though, that they are overworked. For example, as we are making decisions these days, we end up in litigation on every single one. That kind of demand, that kind of litigation, requires staff support. They end up spending an unreasonable and unfair amount of their time simply xeroxing the record in case after case, responding to FOIA requests and that sort of thing. So they are not able, always, to turn their full attention to these petitions. I do have some sympathy with that. I just don't think it is likely in the near future that this administration or any other is going to be asking for resources adequate to address a backlog of that size.

Senator INOUYE. Have you asked for additional funds?

Mr. GOVER. No, sir; maybe a little bit more, but as I say, in evaluating our priorities and the many demands on the BIA, BAR just doesn't make it to the top of the list.

Senator INOUYE. Thank you very much. I have questions I would like to submit.

The CHAIRMAN. Well, that certainly is not fair to the legitimate rights of people that need to be re-recognized and the fruitless ones probably will get some friendly Senator or Congressman to introduce a bill to get legislative relief and do an end run around you. So the end result is we will see more of it.

Thank you, Mr. Assistant Secretary. I appreciate your being here and look forward to the answers to our written questions.

Mr. GOVER. Thank you, Mr. Chairman.

The CHAIRMAN. We will now go to our second panel, which will be Richard Velky, chairman of the Schaghticoke Nation, Kent, CT; Louis Roybal, Governor of the Piro/Manso/Tiwa Tribe; Leon Jones, principal chief of the Eastern Bank of the Cherokees; Mark Tilden, Native American Rights Fund; and Arlinda Locklear, esquire, Knoxville, MD. Ms. Locklear, it is nice to see you again. It has been a while.

We will ask you to do the same thing. Try to keep your comments to about 5 minutes. We will read the testimony, submit questions in writing, and ask questions up to the time we have left.

Why don't we start with Mr. Velky since he is the first one I announced?

STATEMENT OF RICHARD VELKY, CHAIRMAN, SCHAGHTICOKE NATION, KENT, CT

Mr. VELKY. Good afternoon, Mr. Chairman, Senator Inouye and other distinguished members of the Senate Committee on Indian Affairs.

My name is Richard Velky. I am the chief of the Schaghticoke Tribal Nation in Kent, CT. As a long-term solution, we support the concept contained in S. 611, which will establish an independent commission to assume authority for recognizing Indian groups tribal status.

Until such a commission is established, we believe that the Congress mush increase funding to the BIA to give the BAR adequate resources to address the serious backlog of petitions filed by tribes seeking Federal acknowledgement.

The Schaghticoke Tribe has been on ready, waiting for active consideration status since May 1997. In recent years the tribe has been caught up in litigation connected with the United States effort to condemn land on our reservation for the Appalachian Trail right-of-way. The tribe's ability to defend itself from that land condemnation depends upon its Federal tribal status.

While the circumstances of the Schaghticoke Tribes are unique from other tribes in that we are defending litigation brought by the Federal Government against our land, our experience with BAR's acknowledgement process mirrors that of many other tribes.

By the BAR's own estimate, 1999, they may not even begin review the Schaghticoke's petition for another 5 years. They may not reach a final determination of tribal status for 10 to 12 years.

Although the BIA has recently announced new internal procedures to streamline the BAR's lengthy and cumbersome review process, the BIA continues to fail to request the level of funding necessary to adequately staff and upgrade BAR's procedures to

meet the backlog of current petitions and to progress incoming petitions.

The BAR currently receives about $900,000 each year for its work. Significantly, more money is needed for BAR in order to allow it to add staff and other resources that can assist in progressing petitions.

With more funding, the BAR would have the ability to obtain additional assistance with the processing of petitions by hiring additional staff and/or possible outside consultants to conduct preliminary reviews of pending petitions and to weed out those that are more complete for further review by the BIA's professionals.

Additional funding would also provide the BAR with the resource it has apparently lacked in the past to seriously consider expedited procedures to resolve petitions of tribes that are clearly entitled to recognition.

For example, the BAR could have a priority list that would expedite the review process for the tribe by different priority to petition filed by the tribes that are clearly entitled to Federal recognition based on a long-standing recognition under Federal treaties and/or State laws and strong tribal ties with the reservation.

In addition, BAR could consider joining the petitioners of the tribes where factual questions exist as to the relations of ancestries to the petitions of tribes. For instance, the Schaghticoke Tribe believes that it would be in the best interests of BAR to review the pending Golden Hill Progressives and the Schaghticoke Tribe's petition together.

The Golden Hill Progressive petition includes the names of individuals cited as ancestors of the progressive tribe who according to the research of the Schaghticoke Tribe, are clearly the ancestors of the Schaghticoke Tribe.

Therefore, Golden Hill Progressive's application, which is under active consideration is reviewed prior to that of the Schaghticoke Tribe, which is in the line waiting for active consideration.

The Schaghticoke Tribe's case for Federal recognition while being unfairly compromised to the detriment and litigation to the descendants of those ancestors.

In conclusion, the Federal acknowledgement regulations were designed to isolate the BAR from political pressures that might improperly influence determination of Federal tribal status, yet lack of adequate oversight has resulted in an unworkable acknowledgement process from the prospects of many tribes.

By the Galani Tribe's request for Federal recognition the United States, through its inactions impedes prospects for self-determination by otherwise enabling eligible Indian tribes.

Thank you very much for allowing me to testify.

The CHAIRMAN. Thank you. We appreciate your testimony.

[Prepared statement of Mr. Velky appears in appendix.]

The CHAIRMAN. Mr. Roybal, would you go ahead and continue, please. Please honor that time limit we have.

STATEMENT OF LOUIS ROYBAL, GOVERNOR, PIRO/MANSO/ TIWA TRIBE, PUEBLO OF SAN JUAN DE GUADALUPE, LAS CRUCES, NM

Mr. ROYBAL. Good afternoon, Mr. Chairman and members of the committee. My name is Louis Roybal, Governor of the Piro/Manso/ Tiwa Indian Tribe, Pueblo of San Juan de Guadalupe of Las Cruces, NM.

I am honored to be here today to testify on S. 611 on behalf of my people. My people have given much for this country but have received little. For thousands of years we have been a sovereign nation with our own ceremonies, traditions and government along the Rio Grande River in central and southern New Mexico in the lands that were provided to us by the Creator.

We are a traditional Pueblo—the only Pueblo in the administrative process for recognition. We have a tribal council form of government, which combines the ceremonial and administrative offices of the Pueblo under the guidance of the Cacique. Our Cacique who serves for a lifetime carries the core of thousands of years of tribal traditions and ceremonies.

The position of Cacique is documented in Spanish, Mexican, and American records as being in my family for over 300 years. From 1890 to 1910, over 110 children from our Pueblo were taken to Indian boarding schools.

The genealogy submitted in our petition proves that each of 206 tribal members on the tribal roll derives from one or more of the of the 22 distinct full-blood Piro, Manso, and/or Tiwa Indian families.

Today, more than 75 percent of enrolled tribal members reside within the 8 square mile area in or near the old community of Las Cruces.

My people, the Piro/Manso/Tiwa Indian Tribe submitted a petition for Federal recognition in 1971 prior to the current regulations. In 1992, we submitted a petition under the current regulations, with additional material in 1997.

Currently we are seventh on the list of petitioners who are ready and waiting for "active consideration." Today I would like to emphasize three particular points. First, many aspects of Pueblo life are not revealed to outsiders. To do so is to violate our traditions and the teaching of our elders.

Our tribal council, war captains and tribal community debated long and hard about whether to write about highly sensitive subjects in our petition. We have therefore documented this information required by the BAR about our traditions only at a great cost to the people, and in order to show that we meet the criteria for recognition.

As a tribal community, we have suffered whenever the information in our petition has been released by the BAR to outsiders. Because we feel that the material in our petition should be protected, we ask the committee to consider adding language to S.611 to prohibit material in the petition from being disclosed.

Second, we strongly support the intent of S. 611 to make the process for acknowledgement fair and more streamlined. However, the bill would impose different requirements than the current process.

For example, under S. 611, identification as an Indian entity has to go back to 1871. Under the current BAR rules, a petitioner needs to show tribal identification only from 1900.

A third urgent issue is the interpretation of the Native American Graves Protection and the Repatriation Act. My people descend from the cultures of the Salinas Pueblos. In 1995, after years of negotiations with the National Park Service, we reburied three partial Piro Indian human remains.

However, last summer, the Park Service abruptly suspended the discussions when they were advised that they did not have to consult with our tribe because we are not recognized.

Instead, other recognized tribes will determine the disposition of the remains of our ancestors, even though 90 percent of the remains are Piro.

Mr. Chairman, we urge the committee and Congress to pass S. 611. Set us free. Set us free. Return to us our sovereignty, our aboriginal lands, our respect and our honor that was bestowed upon us by the Creator. Thank you.

The CHAIRMAN. Thank you.

[Prepared statement of Mr. Roybal appears in appendix.]

The CHAIRMAN. Mr. Jones.

STATEMENT OF LEON JONES, PRINCIPAL CHIEF, EASTERN BAND OF CHEROKEE INDIANS, CHEROKEE, NC, ACCOMPANIED BY DAN McCOY, CHAIRMAN, TRIBAL COUNCIL; AND GEORGE WATERS, CONSULTANT

Mr. JONES. Chairman Campbell, Vice Chairman Inouye, distinguished members of the Committee on Indian Affairs, my name is Leon Jones. I have the honor of serving as the principal chief of the Eastern Band of Cherokee Indians in North Carolina.

I have with me today the chairman of the tribal council, Dan McCoy, and George Waters, a consultant who works for us here in Washington.

I truly am honored to be here before your committee today, sir.

Senators we know the issue of Federal recognition is perplexing and obviously there are no simple answers. However, we do feel strongly there is an important aspect of this matter that should be clarified and until it is clarified, the subject matter may be more confusing than necessary.

Even the title of the bill, the Indian Federal Recognition Administrative Procedures Act, adds to the confusion. We are not here trying to figure out how to recognize individual Indian people or to reaffirm any one person's Indian-ness, we are trying to determine a fair way to recognize long-standing tribal governments.

From this day forward we ask the committee to begin using the phrase, "Federal Tribal Recognition" instead of the phrase "Indian Recognition."

Upon the outward award of Federal recognition the tribe is empowered with significant authority that they could not previously exercise. On an official government-to-government fiduciary trust relationship is established on the part of the United States for the tribe.

Federally recognized tribes become sovereign units of tribal government. Sovereignty allows for self-rule and for control. Several

tribes, sovereign tribes have the authority and responsibility to establish their own police forces and judiciaries and to incarcerate those who have violated tribal laws.

They can tax both individuals and businesses on their reservation and they must establish membership criteria. They can contract with the United States to perform Federal services, establish hunting and fishing seasons and regulations independent from State regulations.

They can do high stakes gaming and they can be granted treatment as a State status under numerous environmental laws including the Clean Water Act and the Clean Air Act.

By awarding Federal tribal recognition the United States is agreeing that the entity in question is a long-standing and historical tribe whose self-governing authority must be recognized and reaffirmed.

It is therefore critical to the Indian tribes that Federal tribal recognition of the heretofore non-recognized tribes be undertaken in a very deliberative and methodical fashion.

If tribal recognition is attained by any sort of inexact process, the very concept of a special and unique tribal government-to-government relationship and the tribal sovereignty is demeaned and diminished.

There clearly are non-recognized tribes in this country that should have been recognized long ago, particularly those that are signatories to treaties. However, there are ever-larger number of groups seeking recognition that are clearly not deserving of recognition.

Unfortunately, a large percentage of them claim to be Cherokee tribes. I would ask that you review the list that I have provided. I think of how frustrated our people would be, as well as the other two tribes of Oklahoma, Cherokee tribes, when they see it.

These groups have no basis to claim that they are Cherokee tribes.

My testimony describes some of the problems you are having and some of those so-called Cherokees that have obtained recognition in Georgia.

Mr. Chairman, while this matter can get excessive scientifically and only a genealogist could appreciate it, it also has to make sense to the Indian people. In the State of North Carolina we have well-known groups seeking recognition that cannot speak a single word of their claimed Indian language.

They cannot repeat to you a creation legend that is unique to their people. They have no dance or song or burial practice as unique to their claimed tribe. Even if you find one of them who is 100 years old, he or she could not speak a word of their language because there never was a language.

What is it that we are preserving in this case? What would this so-called tribe do that would be unique or different from any small town government? These are significant questions.

We strongly support the provisions of S. 611 that retain the existing legal, historic, sociological, anthropological, and genealogical principles and criteria that the BIA has used since the Federal acknowledgement process began in 1978.

We also support the provisions of S. 611 that use the year 1871 as an historic benchmark from which the petition must demonstrate origin. We are amazed at the House bill, H.R. 361 requires only a demonstration of existence since 1934, hardly a proper benchmark for concepts like historical or continuous.

We have always been bothered by the often-repeated criticism that the BAR has made little headway in whittling down the alleged 237 pending petitions. What has always bothered us about this argument is the vast majority of the so-called petitions for recognition are nothing more than letters of intent.

When letters of intent are submitted to the BIA, they are given a number and those numbers are then factored into the total number of so-called pending positions.

Presently, out of the total 237, there are 166 petitions that the BAR has correctly deemed not ready for evaluation. Out of that 166, there are 103 that are letters of intent with no documentation, 47 that are responding to the BAR's request for more information, ten that are no longer in touch with the BIA at all.

The bottomline is that there are only 25 completed petitions before the BAR that are either in the active status category or ready to be placed into that category.

A valid question has been posed as to why——

The CHAIRMAN. Mr. Jones, we are going to have to move on. I apologize, but we just called the Floor and we only have about 10 more minutes before we have to leave to vote.

So we will take all of your written testimony and put it in the record.

Mr. JONES. Thank you very much, sir. I appreciate that.

[Prepared statement of Mr. Jones appears in appendix.]

The CHAIRMAN. Mr. Tilden.

STATEMENT OF MARK TILDEN, ESQUIRE, NATIVE AMERICAN RIGHTS FUND, BOULDER, CO

Mr. TILDEN. Good afternoon, Mr. Chairman and members of the committee. My name is Mark Tilden. I am a staff attorney with the Native American Rights Fund. We are legal counsel in recognition matters for the Mashpee Wampanoag Indian Tribal Council, the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Miami Nation of Indiana.

I appreciate the opportunity to be here today to give the committee our views on S. 611. What do you do with the Federal regulatory process that is completely broken and unworkable and has been that way for years?

The answer is to replace it with one that works. S. 611 is a starting point to revamp a Federal regulatory process that is plagued with problems. It is unfair, extremely slow and prohibitively expensive for petitioners.

It is unfair in many ways. For example, it is a widely held belief that the BIA has an institutional bias against adding new tribes to the budget. Also, the process takes place behind closed doors.

How are petitioners to fully know the basis of the BIA's decision? Petitioners are not afforded due process because they are not allowed to cross-examine the BAR staff as to the reasons for their decision nor to respond to perceived weaknesses in their petitions.

The process is incredibly slow. It has been reported that the BIA makes 1.3 decisions a year. At that pace, it will take over a century to finally resolve all the petitioners' requests for Federal recognition.

For example, the Mashpee Tribe started its petition work in 1980. The tribe has yet to be placed on active consideration. It might take years for a final decision on its petition. The United Houma Nation filed its petition in 1985. It has yet to be placed again on active consideration so that it can receive a final determination.

The process is expensive. It has been our experience that petitions cost from $400,000 to over $1 million to fully document. That is an incredible amount of money that prevents most non-federally recognized tribes from filing documented petitions.

I want to comment on the changes to the process that were implemented by the BIA this past February that are supposedly designed to streamline and thus speed up the process.

It is a cosmetic change. In fact, we believe that the changes will harm some non-federally recognized tribes. The research burden has been entirely shifted to the petitioners, which is a significant change from the norm under the current regulations.

As I explained, it is an expensive proposition to assemble a documented petition and without assistance from an anthropologist, historian and genealogists, chances are slim a petition will meet the criteria for Federal recognition.

The changes only make it easier for the BIA to deny legitimate tribes Federal recognition. S. 611 is a starting point to fix some of these problems. It sets up an independent commission to deal with the bias and it establishes strict timelines and procedures to speed up the process and to make it a fair process.

It brings Federal decision making out to the open by allowing cross-examination and by allowing petitioners to argue the evidence on the record before an independent commission.

We make specific recommendations in our written testimony to change some of the procedures to make the process more fair. One section of the bill I urge the committee to delete is Section 5(A)(2)(e). It excludes some Indian groups that were involved in litigation raising tribal status issues in Federal court.

That provision should be deleted and not enacted in any form because the sole purpose of the provision is the exclusion of groups that were involved in a fishing controversy in the northwest.

This provision is a remnant from S. 479 back in 1994–95 and that situation no longer exists.

Regarding the criteria, I defer to Arlinda Locklear's written testimony, which addresses that issue. We support her testimony.

In conclusion, committee members, on behalf of my clients I extend our appreciation to you for your efforts to fix a system that is in complete shambles. Cosmetic changes by the BIA will not fix it.

We need the Congress to revamp the entire process so that Indian people who have for years endeavored to achieve their place in history by establishing a government-to-government relationship with the United States are afforded a just and fair opportunity to do so.

Thank you.

[Prepared statement of Mr. Tilden appears in appendix.]

The CHAIRMAN. Thank you.

Arlinda, having heard your articulate and very good testimony in this committee before, I think we have saved the best for last.

STATEMENT OF ARLINDA LOCKLEAR, ESQUIRE, ON BEHALF OF THE MIAMI NATION OF INDIANA

Ms. LOCKLEAR. Thank you, Senator. I appreciate that.

Let me begin by saying I am Arlinda Locklear. I have had the privilege of representing a number of non-federally recognized tribes, both through the administrative process as well as in litigation.

On their behalf, I would like to personally extend our gratitude to both the chairman and vice chairman of this committee. Both of you have worked hard for years in this thankless task of trying to restore justice to non-federally recognized tribes and we appreciate that. We know it is difficult.

Since 1977, we have been at this work. Since 1977, we have seen a number of successive administrations testify before Congress in opposition to Federal legislation that would establish a process or reform the present administrative process in Indian needs.

For the first time today we have heard an administration acknowledge publicly that the process doesn't work, that it cannot be fixed by regulation and that it is appropriate for Congress at this point in time to fix the problem.

It is refreshing to hear, after 20 years at this. We hope that the Congress takes up that challenge and proceeds with this work, because it does appear that now we have a consensus among those interested parties that the time is right for Congress to act, and only Congress can fix this problem.

We applaud the Congress effort in S.611 to undertake that work, as has the Native American Rights Fund testified, we agree, my clients and I, that the commission established by S. 611 is a very good start in that direction.

Half the problem is procedural. The new commission solves that problem by taking it out of the hands of the BIA, by imposing very strict time guidelines on the process itself and by opening the long closed doors on the process so that those Indian communities that are subject to that process can see what happens to them during the process.

Those are all very welcome and much needed changes. However, I would like to emphasize the need for reform as well of the criteria themselves.

Section 5 of S. 611 simply writes into current law, with the exception of one change that was acknowledged earlier in testimony, the present regulatory criteria with regard to acknowledgement of tribes.

Those seven mandatory criteria are essentially lifted out of the present regulations and written in to law. In our view and with the experience we have with the present process, if we do that, that will simply take the burdensome process that now exists and doesn't work and give it to a new group of people in the form of the commission to try to undertake that task.

Ultimately, under the same criteria those commissioners will face the same backlog and the same problem that the BIA does now.

To complete reform we must also address the reform of the criteria. I would refer the committee respectfully to some changes in that respect that have been proposed by Delegate Faleomavaega's bill that is pending in the House of Representatives. That is H.R. 361.

Those criteria were the result of long discussions between representatives of non-federally recognized as well as the administration since this committee's last hearing in 1995 on S. 479.

That committee triggered discussion among those groups and as a result of those long discussions, we came to a general consensus that the criteria set out in H.R. 361 would dramatically improve the process and make it more fair and reasonable.

I understand that the committee has limited time this afternoon, and I don't want to impose on that. However, we would obviously be more than happy to respond to any questions that the committee may have on this.

Again, thank you for the committee's effort and we hope the committee can move forward with this bill with the appropriate changes in the criteria themselves.

The CHAIRMAN. I thank you. We have a little more time so we will continue as long as we can.

I was also pleasantly surprised, very frankly to hear the testimony of the Assistant Secretary. I thought they were going to oppose it. I think with their support it gives us some real opportunity.

We don't have a lot of time left, as you probably know, maybe 50 days or something of actual workdays here, maybe less.

But with their support we might be able to get something done this year, at least I hope so, so we don't have to come back and do this whole thing again.

I would remind Mr. Roybal that when you talk about going clear back to 1971 with your application, I was told by my staff that most of our staff wasn't even born then.

You have done your share of the work. It rather amazed me that it would have languished that long and you haven't been able to get it through.

I would tell Chief Jones, you know we have done some hearings on tribes that have asked for legislative relief rather than going through the BAR process. One tribe some years ago, in fact I think Ms. Locklear was in the room at that time, over in the House side, I asked the tribe that was applying for Federal recognition about their traditions and was told they didn't know of them. I asked them about their form of dance and art which most tribes have and they said they didn't have any of that. I asked them about their language, if they spoke a language and they said nobody could speak the language any more. I asked them about their stories of creation which all tribes have. They said they didn't have that either.

I said to them, "Well, what do you have?"

This gentleman looked me straight in the face and said, "We have a corporation."

I am not sure a corporation qualifies as an Indian tribe, but by the same token, I recognize that some tribes, because of government restrictions that required them by law, under penalty of imprisonment to forget their religion and to stop their dances and to give up their language and do all that, I don't think we can just completely blame it on those who may have forgotten.

A lot of what they forgot was enforced by, unfortunately, this town, the laws in this town. I just mention that so you will know that we have tried to look at it with some kind of a balance.

I know that there is a big difference between an Indian and an Indian tribe. We deal with that all the time.

In talking to Wilma Mankiller a few years ago, in fact when she was principal chief of the Cherokee in Oklahoma, she told me that they were averaging 1,400 requests per month for enrollment within the Cherokee.

There were so many that they were totally unable to do the legislative work to do any kind of research. They would write back and tell the people, do your own research and turn it in if you have some kind of proof.

It gave me a pretty strong indication of how many people want to be Indian now when they didn't want to 20 years ago or 25 years ago. I have to think that maybe some of it is for tradition, recognition, honor and respect, as Mr. Roybal mentioned.

I have to also believe that part of that is the potential of money. It is as simple as that.

Mr. Vice Chairman, would you like to make a statement or ask any questions? We have a few more minutes before we have to run.

That was the first call to vote. I think we can stretch this a few minutes.

Senator INOUYE. I just noticed that there is a call to vote. As you have indicated, Mr. Chairman, we have about 20 working days left in this session.

Ms. Locklear, what would you suggest we do if we are not able to pass legislation in this session? Ms. Locklear. We would hope, Senator, that the committee could indicate pretty clearly that this would be a top legislative priority for the next session.

Particularly since we have now an indication from the Administration that legislation is appropriate, we would hope that legislation could move much more quickly than obviously it has not been able to do in the past.

We understand and appreciate that time is short. However, even with a markup to consider some appropriate changes to this bill, that would help advance the legislative cause so that when you return the next Session of Congress you may be able to do so quickly.

The CHAIRMAN. This afternoon the Senate will be voting on appointments. As you know, this commission is made up of three Presidentially appointed commissioners. The Senate will have to confirm the nomination.

Will that be politicizing the process? Would any of you like to respond to that?

Ms. LOCKLEAR. If I may offer a comment, Senator, there has been some concern expressed to me by some of my clients that that would in fact politicize the process.

There has also been some concern expressed that by use of Presidential appointment it may unduly delay the creation of the coming together of the commission itself so that it can begin that important work.

For that reason, there has been some discussion of perhaps creating a commission that is independent of the BIA, but nonetheless housed within the Department of the Interior so that those appointments would not require Presidential action.

That would accomplish both goals of establishing the independent review of the petitions that everybody believes is necessary at this point, but also allowing those independent commissioners to begin their work sooner so that we can address this backlog of petitions sooner rather than later.

Senator INOUYE. Would you support a proposal whereby Indian country would be called upon to submit a list of, say, 12 names from of which the President would select three?

Ms. LOCKLEAR. That may work, Senator, so long as it is clear that Indian country in that context includes non-federally recognized communities. Unfortunately, there is a dynamic in Indian country by which some tribes oppose acknowledgement of other tribes.

So to make that inquiry, it would require input from all parts of Indian country, recognized as well as non-federally recognized.

Senator INOUYE. Mr. Chairman, I have a whole list of questions to submit for the record.

The CHAIRMAN. We have been called to vote. We will submit questions to each of you, if you could get the responses back in writing.

I might tell you that your suggestions and comments will be included. We will keep the record open for 2 weeks.

We are out next week, as you know. Over the Memorial Day break we will be out but staff will be working on this. We will try to get this marked up within 2 weeks if we can.

With the administration's help, you never know, we might have a real chance. With that, I certainly appreciate all of you being here. I look forward to working with you.

Thank you. The committee is adjourned.

[Whereupon, at 3:16 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF ROBERT M. CHAVIS, VICE CHAIRMAN, TUSCARORA EAST MOUNTAINS

Native Americans across the country know first hand that the Bureau of Indian Affairs and the Department of the Interior are famous for the mismanagement of Indian Affairs. The Department of the Interior has mismanaged the process of Federal recognition of Native American Indian tribes for years. There is documentation of these mismanaged areas and even most recently of the mismanagement of Indian moneys.

Native American tribes like my own that have all their history and genealogy all the way back too the 1700's and to the time of 500 AD as the Tuscarora people in North Carolina, are being made to wait as long as 10, 20, 30, or 100 years before they even get to fully challenge the process of the BIA of the Department of the Interior. S. 611 would give tribes the dignity of going before a commission that would look at the information the tribe has and from that black and white information make an decision on the tribes status. In 1978 the BIA adopted regulations to give unrecognized tribes, or tribes that some how had been omitted from the recognized list returned to a federally recognized tribe. Needless to say this process has failed greatly. The BIA currently takes decades not months or years to even approach this process. Native American's now exists as first, second, and third-rate people among other Native American Indians because the U.S. Government has made these classes of federally, State recognized Indians and the non-recognized Native American Indian tribes. Some Indians have and some other Indians have not.

Meanwhile Native American children and adults are not receiving the benefits of much needed healthcare, housing and economic development, and self-governance provided to federally recognized tribes. The Tuscarora East of the Mountains have several young children that are blind and have severe learning disabilities and they are not receiving the help they so desperately need. Jobs are being lost or are just not obtainable due to the economic status of the tribe. The BIA for some reason will meet with your tribe once or twice then they will tell you that meetings are not needed just send any information by mail and they do not even want to speak with you on the telephone in hopes that you will just go away or maybe died out someday. The S. 611 commission would give timely action to this process especially when all the information can be set in front of them like in our case. George Washington made a treaty with the Tuscarora that said we should have rights to land and hunting and self-government for helping in several different wars. Where does that promise exist now. Please pass S. 611 as it would be a major milestone in the relationship between the U.S.A. Government and the Native American people that live here and who have lived here long before the U.S. Government existed.

PREPARED STATEMENT OF SENATE PRESIDENT DRUE PEARCE AND SPEAKER OF THE HOUSE BRIAN PORTER, ALASKA LEGISLATURE

As you know, Alaska Natives have traditionally been treated separately from Indian tribes in the Lower 48 States, for a variety of reasons. S. 611 purports to create an independent three-member commission on Indian recognition to determine recognition as a tribe. The bill also establishes standards for making recognition determinations.

Section 3(14) of the bill defines the term "Indian tribe" in a manner that would ratify Assistant Secretary Deer's attempt to "recognize" Alaska Native villages throughout the State as tribes. It does so by including any Alaska Native tribe acknowledged by the Secretary as of the enactment of the act—whether that prior recognition was lawful or not. Because we have consistently held that Assistant Secretary Deer's "recognition" of tribes in Alaska was not lawful, and because the result was not intended by Congress, we must voice our opposition to the provisions contained in S. 611.

From the purchase of Alaska in 1867 to the present day, Congress has subjected Alaska Native residents of Native villages to the same civil and criminal laws as non-Native residents of Alaska. Consistent with that policy, Congress has not recognized Native residents of Native villages as "federally recognized tribes" whose governing bodies possess sovereign immunity and exercise governmental authority. Prior to 1993 that also was the position of the Secretary of the Interior.

In 1978, the Secretary promulgated regulations that authorize a group of Native Americans to petition the Secretary for acknowledgement that the group is a "federally recognized tribe." The regulations also establish the procedure with which the Secretary must comply to evaluate a petition.

The Secretary's 1978 acknowledgement regulations are *ultra vires,* and hence unlawful, because Congress has not delegated the secretary authority to "recognize" groups of Native Americans as "tribes" in Congress's stead.

Even assuming *arguendo* that Congress had delegated the Secretary authority to promulgate his acknowledgement regulations, between 1978 and 1988, the Secretary consistently held to the view that Alaska Native residents of Native villages were not members of tribes, even though since the 19th century Congress has authorized the Department of the Interior and the Indian Health Service to provide Alaska Natives many of the same education, health, and other services that the Department and the Service provide in the Lower 48 States to Native Americans who are members of "federally recognized tribes." In 1993 then Assistant Secretary of the Interior for Indian Affairs Ada Deer unilaterally repudiated the Secretary of the Interior's 1988 pronouncement by deeming that Alaska Native residents of each of more than 200 Native villages is a "federally recognized tribe."

Secretary Deer's action was *ultra vires.* First, because as she was well aware, her pronouncement contravened Congress's decision that Alaska Native communities not be accorded sovereign tribal status. And second, because as she also was well aware, no Native residents of any Native village had petitioned the Secretary of the Interior for acknowledgement of their tribal status, as his regulations require.

Seven years later, Secretary Deer's pronouncement remains as unlawful today as it was in 1993. Therefore, ratifying an unlawful recognition of Alaska Native villages as tribes is inappropriate and contrary to congressional intent.

Thank you for accepting our comments.

STATEMENT OF KEVIN GOVER
ASSISTANT SECRETARY - INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR
AT THE HEARING BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
ON
S. 611, THE INDIAN FEDERAL RECOGNITION ADMINISTRATIVE PROCEDURES ACT OF 1999

May 24, 2000

Good afternoon, Mr. Chairman and Members of the Committee. Thank you for the opportunity to present our views on S. 611, the Indian Federal Recognition Administrative Procedures Act of 1999. The Administration shares the Committee's concern for providing a fair and effective acknowledgment process. The Administration supports the efforts to improve the acknowledgment process which is embodied in S. 611. However, the Administration cannot support S. 611 as written without amendments which I have included within my statement.

BACKGROUND

Federal acknowledgment entitles those tribal entities to the immunities and privileges available to federally recognized tribes by virtue of a government-to-government relationship with the United States of America, as well as to the responsibilities, powers, limitations, and obligations of those tribes. Federal acknowledgment grants tribes protections, services, and monetary benefits from the Federal Government.

In 1978, the Branch of Acknowledgment and Research (BAR) was established under the Bureau of Indian Affairs (BIA) for the specific purpose of reviewing and evaluating petitions for acknowledgment, and providing reports and recommendations to the Assistant Secretary for Indian Affairs (AS-IA). For the Department, the AS-IA makes decisions on acknowledgment petitions based on the facts of each case. The BAR staff works with petitioning groups which are seeking to be acknowledged under 25 CFR Part 83, *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.*

RECENT DEVELOPMENTS

The Administration appreciates the work done by you and your staff to ensure a timely, fair, and objective process takes place. The Department has come under criticism over the past several years. We are committed to working with the Committee to improve the acknowledgment process. However, I must stress that many external factors affect the overall acknowledgment process. Responding to increasing numbers of Freedom of Information Act (FOIA) requests, preparing voluminous administrative records for appeals, answering questions concerning pending decisions before the Interior Board of Indian Appeals, and preparing the administrative records for litigation in Federal Court all put additional demands on our staff. Yet, we are continuing to look at ways to minimize delays, and reduce the length of time it takes to process acknowledgment cases within the

framework of the existing regulations.

In August 1999, the National Academy of Public Administration presented its report outlining recommendations on ways of improving the BIA administrative functions and services. In line with this report and to demonstrate our commitment, we changed certain internal procedures for processing petitions submitted by groups requesting Federal acknowledgment as an Indian tribe, and clarified other procedures. We published a directive in the February 11, 2000, Federal Register which makes administrative procedural changes to the process to alleviate the current delays in decisions. These revised procedures still work within the framework of 25 CFR Part 83, and do not change the acknowledgment regulations.

Let me tell you about some of the achievements we have made in the past 10 months. We are producing more decisions without increasing staff and we are pleased to report the following four final determinations: (1) acknowledgment of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan (eff. 8/23/99); (2) acknowledgment of the Snoqualmie Indian Tribe in Washington (eff. 10/6/99); (3) denial of acknowledgment of the Mobile-Washington County Band of Choctaw in Alabama (eff. 11/26/99); (4) denial of acknowledgment of the Yuchi Tribal Organization, Inc., in Oklahoma (eff. 3/21/2000). In addition, we published a Final Determination to acknowledge the Cowlitz Tribe of Indians in Washington on February 18, 2000, in the Federal Register.

Three proposed findings were published in the Federal Register as follows: the Steilacoom Tribe from the State of Washington on February 7, 2000, the Eastern Pequot Indians of Connecticut on March 31, 2000, and the Paucatuck Eastern Pequot Indians of Connecticut on March 31, 2000. We anticipate the publication of a proposed finding for the Little Shell Tribe of Chippewa Indians of Montana later this month.

Currently, the BIA is preparing four recommendations. We anticipate that final determinations for the Chinook and Duwamish petitioners and proposed findings for the two Nipmuck petitions from Massachusetts, will be published this summer. At the same time, the Department has been working with the terminated tribes of California seeking restoration.

AREAS SUPPORTED WITHIN S. 611

I would like to take this opportunity to highlight certain sections of S. 611 that we support. First, S. 611 establishes the criteria and standards for acknowledgment through legislation, rather than through regulation. The Administration supports this change as a means of giving clear Congressional direction as to what the criteria for acknowledgment should be.

Second, S. 611 provides a sunset rule. We have supported such a provision in the past. To implement this rule, separate deadlines for filing letters of intent and for filing documented petitions should be provided for in S. 611. The Commission on Indian Recognition (Commission) would then be able to define its anticipated workload, and determine whether sufficient funds have been

authorized to handle what may likely be a very substantial work load within a 12-year limit. We submit that the Congress will want to carefully consider the time constraints established for the Commission, and provide the resources needed to: (1) handle the FOIA requests, (2) protect privacy records, and (3) provide administrative records to the courts in case of appeals and other litigation.

Third, we strongly support the provisions concerning assistance to petitioners and the authorization of appropriations commensurate with the work load, the sunset rule, and staffing considerations.

Finally, we support the idea that neither positive nor negative past acknowledgment decisions would be reopened.

CONCERNS

We object to the language within S. 611 that would remove the authority of the Department to acknowledge tribes. Historically, the Department has had the authority and has the primary responsibility for maintaining the trust relationship with Indian tribes. The Government's expertise and institutional knowledge are housed within the Department. As I've stated earlier, we have made many improvements in the acknowledgment process. We believe this progress should continue.

S. 611 contains broad language which would exclude groups which were adjudicated by a court that were found not to be a tribe. We believe a blanket prohibition to be unnecessary and undesirable. We reference the acknowledgment of the Samish and Snoqualmie, who would not have been considered if the prohibition were in place.

We recommend additional provisions in S. 611 that would:

- Provide a detailed standard of proof as in the existing regulations (25 CFR 83.6 (d) and (e)), which mandate that a reasonable likelihood standard of proof be used;

- Allow for other evidence for previous acknowledgment besides that listed in the bill;

- Clarify the transfer of petitions currently on active consideration before the Department;

- Clarify the sunset rule. We recommend that the sunset rule should require a deadline for submitting a documented petition (see 5(d)), not just for a petition. In addition, after 12 years, neither the Department nor the Commission (which ceases to exist) has authority to acknowledge. We are concerned about cases where a court overturns a denial by the Commission;

- Clarify the Privacy Act protections and Freedom of Information Act exemptions when the Commission, a petitioner, or a concerned party uses or requests other tribes' rolls or membership lists;

- Provide a definition of the administrative record for purposes of judicial review;

- Clarify appeal rights. S. 611 limits a petitioner's appeal rights to 60 days, rather than the standard six years. At the same time, S. 611 does not limit the time for a third party to

challenge the decision to a parallel 60-day period;

- Clarify the section on appropriations. The current appropriations language accounts for 2001 to 2009, or only until the deadline for submitting a petition, not for the years remaining for the Commission to complete its work; and

- Delete section 4(e)(1)(A) which provides an excepted service appointment authority and administratively determined pay for the Commission staff. Such authorities are inappropriate for an organization which will exist for 12 years.

This concludes my prepared statement and I look forward to continuing our dialogue with the Committee on this issue. I will be happy to answer any questions the Committee may have.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUL 11 2000

Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Mr. Chairman:

I am pleased to provide the responses to the supplemental questions submitted by the Senate Committee following the hearing on S. 611, the Indian Federal Recognition Administrative Procedures Act of 1999, held on March 24, 2000.

Should you have any questions, please contact my office at 202-208-5706.

Sincerely,

Assistant Secretary - Indian Affairs

Enclosure

cc: Daniel K. Inouye
Vice-Chairman

Question 1: How many staff work in the BAR? How many staff do you need to process the petitions in a timely manner?

Answer: Currently, the Branch of Acknowledgment and Research (BAR) within the Bureau of Indian Affairs Office of Tribal Services consists of 11 staff members. The staff members include: one Branch Chief, two Secretaries, three Cultural Anthropologists, two Genealogical Researchers and three Historians.

With 46 cases resolved over the past twenty-one years, the historical average is just over 2 cases per year. In order to process petitions more efficiently under a four-year program to eliminate the current workload of 25 cases (14 active, 11 ready for active), we believe an additional 16 individuals would have to be hired as follows: one Administrative Assistant, one Secretary, three Cultural Anthropologists, four Genealogical Researchers, three Historians, three Interns/Research Assistants, and one (1) Records Management/ FOIA/Privacy Act Officer.

We believe a total staff of 27 would provide six research teams. Each team could handle 12 cases, producing 6 Final Determinations and 6 Proposed Findings per year. We anticipate that as our decisions increase, petitioners and interested parties seeking due process will continue to require the preparation of administrative records for appeals and litigation. The additional Secretary and Records Management/ FOIA/Privacy Act Officer will alleviate the increased administrative workloads of distributing copies of petitioners records created by appeals, litigation, and FOIA requests.

Question 2: I oppose the "legislative route" for tribes seeking recognition because it is unfair to petitioning groups and I don't believe we have the resources to adequately consider all the facts involved. <u>But I've got to be frank with you</u> — what should I tell Indian groups who have languished in the BAR for years, sometimes generations? Should I tell them to "be patient"? Or "go to see your Senator for legislative help"?

Answer: We recommend that you be frank and honest with your response. The record shows that the BAR staff have worked to provide evaluations of petitions in a timely manner. However, with numerous petitioners, as well as FOIA requests, litigation, and hiring freezes, backlogs have occurred.

The process is slow. It takes years for a petitioner to create a petition and for BIA to process a petition.

The BAR reviews and evaluates petitions for federal acknowledgment of tribes following the *Procedures for Establishing that an Indian Group Exists as an Indian*

Tribe (25 CFR Part 83). For a group, the process includes filing a letter of intent to petition; provide a documented petition complete with governing documents of the group, a history of the group, a membership list for the group and other items to meet the requirements as mandated within the regulations. The BAR applies anthropological, genealogical and historical research methods in a review of the petitions for federal acknowledgment of a group as a tribe. Once a group has provided their complete package of materials, the petition moves to the "Ready, Waiting for Active Consideration" ("Ready") list.

The petitioners on the "Ready" list have been there from 2 to 4 years. The cases on active consideration, including those with proposed findings, have been in process for approximately 2 to 9 years. In addition, many of these petitioners requested extensions to their comment periods and were granted extensions for good cause.

Question 3: S. 611 has a 12-year "sunset provision" after which no petitions would be considered. Let me cut to the chase here--do you envision the BAR being a permanent fixture in the BIA, or is there some point beyond which petitions will not be accepted?

Answer: We support the "sunset" provision. A "sunset" provision needs multiple deadlines: one for a letter of intent (or dispense with the letter of intent); one for submission of a documented petition; and one for completion of evaluation of documented petitions. We anticipate that a "sunset" provision will induce groups to fully document their petitions by a certain time frame (6 years), then allow the petitions to be processed by the end of the twelfth year. There will definitely be a tremendous increase in documented petitions to be reviewed under the sunset rule. We acknowledge that whatever the workload will be, funding for this program must be commensurate with the expectations and workload.

The Department does not have the authority to refuse to consider requests for acknowledgment. Congress would have to provide for an end to acknowledgments through legislation, setting out time lines and, a process by which all deserving candidates are notified and have a meaningful opportunity to apply.

The continuing receipt of large numbers of letters of intent to petition comes as a surprise to the Department. In 1978, when the process was established by Congress, a "locator" project was established to locate and identify all possible claimants. Nevertheless, numerous new petitions continue to be received from groups whose existence was not known or, according to the information received, did not exist 15 years ago, despite the earlier effort. We believe that the Congress needs to look at the increasing number of groups that are petitioning before drawing any conclusions.

Question 4: Why are you confident that the February regulations will succeed where previous revisions of the regulations in 1991 and 1994 did little to improve this process?

Answer: The acknowledgment regulations were promulgated in 1978 and revised in 1994. We believe the 1994 revisions improved the process. The current BAR staff is smaller in number than it was in 1994, but issues more recommendations to the Assistant Secretary for Indian Affairs. The staff deal with a much larger volume of appeals, litigation cases, and document requests, in part, as a result of the increased number of decisions. We acknowledge that the 1994 improvements were intended to increase the speed at which the petitions were processed, however, some were intended to address claimed unfairness, e.g., by providing an "on the record" technical assistance meeting, explicitly stating the evidence required, and giving a lesser burden to previously acknowledged groups.

On February 11, 2000, the Assistant Secretary for Indian Affairs published a notice of changes in the internal processing of federal acknowledgment petitions. These revised procedures do not change the acknowledgment regulations, 25 CFR Part 83. It is too soon to determine whether the February 2000 revision of procedures will "succeed" or not. This will not be evident until the process is fully implemented, which will take some time. However, the effects of this directive on the production are beginning to show; on February 14, 2000, the Assistant Secretary for Indian Affairs signed a Final Determination for the Cowlitz Indian Tribe in Washington, and published notice of this determination in the Federal Register on Feburary 18, 2000. On March 24, 2000, I signed two proposed findings for the Eastern Pequot and Paucatuck Eastern Pequot petitioners from Connecticut, and published notices of the two proposed findings in the Federal Register on March 31, 2000. A proposed finding for the Little Shell Tribe of Chippewa Indians of Montana is expected to be published this month. In addition, the BAR is preparing the Chinook (Washington) Final Determination recommendation and the Duwamish (Washington) Final Determination recommendation during fall 2000. The proposed finding recommendations for the Nipmuck #69a (Massachusetts) and the Nipmuc #69b (Massachusetts) are expected in November 2000. The Snohomish Final Determination recommendation is slated for December 2000.

The existing acknowledgment process over the past 10 months has produced the following:

- Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan (final) (formerly, Gun Lake Band), effective August 23, 1999 - acknowledged;

- Snoqualmie Indian Tribe, Washington, (final) effective October 6, 1999 - acknowledged;
- Mobile-Washington County Band of Choctaw Indians of South Alabama, (final) effective November 26, 1999 - not acknowledged
- Yuchi Tribal Organization, Oklahoma (final) signed December 15, 1999; published in Federal Register on December 22, 1999, effective March 21, 2000; and the
- Steilacoom Tribe, Washington (proposed) signed January 14, 2000; published proposed finding in Federal Register on February 7, 2000.

Question 5: The status of many of the unrecognized tribes in California is very unclear. Is there any effort to clarify that status? What efforts?

Answer: The current status of unrecognized groups is either that they were once recognized and terminated, or have not been previously recognized.

We have devoted considerable effort to exploring the status of the California petitioners. We have conducted several meetings and consultations with the Advisory Council on California Indian Policy (ACCIP) and others in the past several years. The ACCIP submitted a report to clarify the evolution of Federal policy toward land-based and landless California groups in the 20th century. The State of California now constitutes the largest single block of remaining petitioners. We believe that the most fruitful approach is to deal with all petitioners on the same basis, since the status and character of all petitioners varies substantially.

Statement of Chief Richard L. Velky
Schaghticoke Tribal Nation
Kent, Connecticut

Senate Committee on Indian Affairs

May 24, 2000

Hearing on S. 611
A bill to provide administrative procedures to extend
Federal Recognition to certain Indian groups

Chairman Campbell and other distinguished Members of the Senate Committee on Indian Affairs, my name is Richard L. Velky and I am the Chief of the Schaghticoke Tribal Nation ("Schaghticoke Tribe") of Kent, Connecticut. We commend the efforts of Senator Campbell and the Senate Committee on Indian Affairs to find a legislative solution to the considerable delays facing tribes that are seeking federal recognition. Over the past several years, the Schaghticoke Tribe has become intensely aware that the current acknowledgment process under the Branch of Acknowledgment and Research (BAR) of the Bureau of Indian Affairs (BIA) is broken and must be fixed. As the Schaghticoke Tribe has been working to obtain federal recognition, we have learned a great deal about the existing procedures, and, unfortunately, about how deeply those procedures become mired in endless delay.

As a long-term solution to these bureaucratic delays, we support the concept contained in Senate Bill 611 that would establish an independent Commission to assume authority for recognizing an Indian group's tribal status. Given the shortened legislative calendar this year, however, and competing demands upon this Congress, we are concerned that S. 611 may not receive action this year. Therefore, until such a Commission is established, we believe that Congress must increase funding to BIA to give BAR adequate resources to address the serious backlog of petitions filed by tribes seeking federal acknowledgment.

A tribal petitioner can expect to wait eight to ten years as its petition for federal acknowledgment winds through the various stages of BAR investigation, review, and post-determination appeal. As a result, it is safe to say that the federal acknowledgment process – the process that establishes the fundamental right of Indian tribes to engage in government-to-government relationships with the United States – is broken.

The first stage for substantial agency delay is the "Ready, Waiting for Active Consideration" queue. The regulations set no time limit as to how long the BAR may permit a petition to languish there. Five of the eleven petitioners currently in the "Ready, Waiting for Active Consideration" queue have been waiting for more than four years. The Schaghticoke Tribe has been waiting three years.

Evaluation does not begin until the tribe's petition advances to the "Active Consideration" phase. The regulations require the BAR to issue a "Proposed Finding" on the tribal entity's federal status within a year of beginning its active consideration of the petition (with discretion to extend active consideration for an additional 180 days). In spite of these regulatory timelines, the tribes under active consideration and awaiting a Proposed Finding or Amended Proposed Finding have been waiting an average of three years. See, BAR, Summary Status of Acknowledgement Cases, April 4, 2000.

Following the Proposed Finding, the process can still continue for years. The BAR issued Proposed Findings for the United Houma Nation, the Duwamish Indian Tribe, and the Chinook Indian Tribe/Chinook Nation in 1994, 1996, and 1997 respectively. None of these tribal entities have received a "Final Determination" of tribal status, yet each has been under active consideration for nine, eight, and six years, respectively.

Even a Final Determination may lack finality, as, for the first time, appellate review is available, either in the agency or in the federal courts. For example, the Final Determination of the Match-E-Be-Nash-She-Wish Band of Pottawotami Indians of Michigan was suspended pending appeal brought by the City of Detroit. That Determination was finally effective last year, nearly a year after it was first "final."

The Schaghticoke Tribe has been in "Ready, Waiting for Active Consideration Status" since May 29, 1997. There are seven tribes on just the "Ready, Waiting for Active Consideration" list ahead of them, which does not include the tribes in Active Status awaiting a Proposed Finding or Amended Proposed Finding, some of which have been there since 1995. That also does not include the four tribes awaiting Final Determinations.

For the Schaghticoke Tribe, the deterioration of the federal acknowledgment process has serious implications. The Schaghticoke Tribe has been continuously recognized from historic times by the Colony and State of Connecticut. Our Tribal Reservation in Kent, Connecticut, provides the historical and spiritual base for our tribal members. The Reservation is mountainous and rocky, with a small strip of flatland located on a flood plain along the Housatonic River. For us, federal recognition is essential to our ability to safeguard what remains of our tribal holdings and to secure our survival into the future.

The Schaghticoke Tribe has managed to survive the past centuries under adverse circumstances. We lost the great majority of our original landbase to incoming settlers and to the "overseers" commissioned by the Colonial and State authorities to manage the resources of impoverished tribal members. As subsistence became impossible, tribal members sought survival elsewhere, but always returned to the Reservation, at least at the end of their lives. Over time, the State's "detribalization" policies sought to take away even that last refuge, gradually attempting to force the remaining families from their reservation home, even burning homes to hasten abandonment.

We have not abandoned our homeland and we refuse to do so. For years, tribal members have fought against State policies designed to terminate and separate tribes from their reservations.

The Schaghticoke Tribe's federal attempts to preserve its heritage and defend its landbase have ranged from an unsuccessful claim filed in the Indian Claims Commission in 1949, to our current petition for federal recognition and pending land litigation. Throughout its history, and continuing into the present, the State has continued its formal recognition of the Schaghticoke Tribe. Although our petition for federal acknowledgment has been pending with BIA since 1997, the United States has not reached any conclusion about our tribal status. Nonetheless, the United States has routed the Appalachian Trail directly through the Reservation, without any authority to do so. It has trespassed on our lands without even a shred of a claim of any right to do so.

In recent years, the Tribe has been caught up in litigation connected to the United States' efforts to acquire additional land for the Appalachian Trail right of way. The Tribe's ability to defend itself from that land condemnation depends upon its federal tribal status. The United States filed its condemnation suit in 1985, and, over its many objections, that action was delayed pending the determination of Schaghticoke tribal status. Since the submission of the Tribe's research to the BAR in 1997, the federal government has changed its approach. Now the government is willing to wait years for the BAR to determine the Schaghticoke Tribe's federal status. By the BAR's own estimates in 1999, it may not even begin review of the Schaghticoke petition for another five years, and may not reach a final determination of tribal status for ten to twelve years.

While the circumstances of the Schaghticoke Tribe are unique in that we are defending litigation brought by the federal government against our land, our experience with the BAR's acknowledgment process mirrors that of many other tribes. From its inception, the BAR's performance has been marked by delay. Since 1978, the BAR has resolved only 30 petitions through the acknowledgment process in 22 years, averaging 1.4 petitions a year.

Although the BIA has recently announced new internal procedures to streamline BAR's lengthy and cumbersome review process,[1] the BIA continues to fail to request sufficient funding to adequately staff and upgrade BAR procedures to meet the backlog of current petitions and to process incoming petitions. Even if under the new revised procedures and current resources, BAR was able to double or triple its processing time, it would still move only two to three tribes off the application list per year. With more than 150 tribal entities that have expressed their intent to seek recognition, it could potentially take 50 to 75 years before BIA could clear this current backlog.

The BAR currently receives only about $900,000 each year for its work.[2] Significantly more money is needed for BAR in order to allow it to add staff and other resources that can assist with processing the petitions. As BIA has acknowledged, the current BAR staff is overwhelmed not only with processing existing and incoming petitions, but also with responding

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[1] See 65 Fed. Reg. 7052-53 (February 11, 2000).

[2] Funding for the acknowledgment process (along with tribal government and tribal court programs) is contained within Tribal Government Services, a program element of Central Office Operations. Approximately $900,000 of Tribal Government Services funds went to BAR in FY 1999 and FY 2000, according to that office.

to information requested in connection with independent review of Final Determinations by the Interior Board of Indian Appeals and with five pending lawsuits concerning acknowledgment decisions.[3] The BIA staff is also tasked with responding to substantial numbers of Freedom of Information Act (FOIA) requests.[4]

The BAR's own estimates for processing petitions raise further questions about its capacity to make any headway without significant additional resources. For example, the Schaghticoke Tribe's petition was deemed "Ready, Waiting for Active" in 1997. At that time, BAR officials estimated completing action on our petition in one or two years. In 1998, the BAR explained to me that it would need another two to three years to work our petition through the system. In 1999, the BAR anticipated that more than seven to ten years will pass before the Schaghticoke Tribe's federal status can be resolved. Without significant additional funding to BAR, we anticipate that the new internal procedures at BAR will not significantly increase the speed with which our petition is processed.

With more funding, BAR would have the ability to obtain additional assistance with the intake and processing of petitions, by hiring additional staff and/or possibly outside consultants to conduct the preliminary review of the pending petitions and weed out those that are most complete for further review by BIA professionals. Additional funding would also provide BAR with the resources it has apparently lacked in the past to seriously consider expedited procedures to resolve petitions of tribes that are clearly entitled to recognition, for example through the establishment of a priority system for tribes meeting certain criteria.

For example, BAR could expedite the review process for certain tribes by giving priority to petitions filed by tribes that are clearly entitled to federal recognition based on long-standing recognition under federal treaties and/or state law and strong tribal ties to a reservation.

In addition, the BAR could consider joining the petitions of tribes where factual questions exist as to the relation of the ancestry of the petitioning tribes. For instance, the Schaghticoke Tribe believes that it would be in the interest of the BAR to review the pending Golden Hill Paugusset and Schaghticoke Tribe petitions together. BAR review of the Golden Hill Paugusset petition without reference to the information contained in the Schaghticoke Tribe petition has serious implications for the Schaghticoke Tribe and does not make sound policy sense.

The Golden Hill Paugusset petition includes the names of individuals cited as ancestors of the Paugusset Tribe who, according to the research of the Schaghticoke Tribe, are clearly ancestors of the Schaghticoke Tribe. Therefore, if the Golden Hill Paugusset application, which is under Active Consideration, is reviewed prior to that of the Schaghticoke Tribe, which is eighth in line for Active Consideration, the Schaghticoke Tribe's case for federal recognition will be unfairly compromised to the detriment of the legitimate descendants of those ancestors.

The BAR bases its findings on the accuracy of the material submitted by tribes to document the seven criteria for federal acknowledgment and uses a "preponderance of the

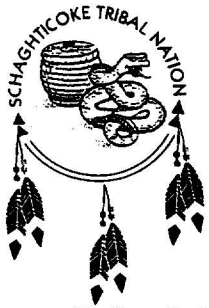
[3] See 65 Fed. Reg. 7052 (February 11, 2000).
[4] Id.

evidence" standard. Establishing ancestry based on bloodlines is obviously a complicated, fact-based inquiry. Given that there are critical factual issues in question as to the ancestry of these two Connecticut tribes, we believe the BIA should have the flexibility to combine the petitions in order to prevent making a determination on the merits of the Golden Hill Paugusset petition without benefit of the information contained in the Schaghticoke Tribe petition. Accuracy in government public policy-making and the soundness of agency decisions is in the interest of all concerned – the Schaghticoke Tribe, the Golden Hill Paugusset, and the federal government.

In conclusion, the federal acknowledgment regulations were designed to insulate the BAR from political pressures that might improperly influence determinations of federal tribal status. Yet lack of adequate oversight has resulted in an unworkable acknowledgment process from the perspective of many tribes.

With more than 150 tribal entities expressing their intent to seek recognition of a government-to-government relationship with the United States, the inability of the BAR to respond to requests for federal recognition constitutes a denial of justice and runs counter to stated federal policy favoring self-determination. By delaying tribes' requests for federal recognition, the United States, through its inaction, impedes prospects for self-determination by otherwise eligible Indian tribes.

On behalf of the Schaghticoke Tribal Nation, I thank the Committee for today's hearing, and its deeply committed interest in this most important matter.



SCHAGHTICOKE TRIBAL NATION

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June 12, 2000

The Honorable Ben Nighthorse Campbell
United States Senator
Chairman of the Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Senator Campbell:

I very much appreciated the opportunity to present information on S. 611 and the federal recognition process from the perspective of a Chief struggling with a system and procedure that will conceivably take 12 to 15 years for my tribe to achieve federal acknowledgment. I hope that you and the other committee members find this intolerable, inexcusable and a denial of our rights and due process under law.

In response to your questions, I will direct my answers as best I can to specific situations affecting my people and our tribe.

Federal Recognition is important in several ways. As you have seen from my testimony, the U.S. Government has sued my Tribe to condemn a portion of our reservation for the expansion of the Appalachian Trail. This case has been in the U.S. Federal District Court since 1985 and has been stayed by the judge pending settlement of the federal recognition issue. Not only has our land been taken numerous times without Congressional approval since 1790, it continues today, by the very people who should be protecting us. With Federal Recognition, the threat to our ancestral home will stop! Recognition will also allow government to government relations between the Tribe and the U.S. Government as opposed to relations with the State of Connecticut.

When researching our land claims associated with the reservation designated by the Colony of Connecticut in 1736, we found that a Tribal burial ground, thought to have been moved in 1905, was actually never moved. What is now the successor company, the Connecticut Light and Power Company, built a dam on the Housatonic River, which runs adjacent to our reservation in Kent, Connecticut, and condemned all the property surrounding the burial ground, then proceeded to flood the area, preventing us access to the site. I can think of nothing more sacred to us as Native Americans as the preservation of our sacred sites where our ancestors lay. Yet this goes unchecked. Federal Recognition will give us the ability to legally fight this encroachment.

Schaghticoke Reservation: Schaghticoke Road, Kent, CT 06757 • P.O. Box 893 • tel. 860-927-8050
Business Address: 601 Main Street. Monroe. CT 06468 • tel. 203-459-2531 • fax 203-459-2535

In the course of waiting for action, several elders of my Tribe have died. These individuals were an important link to the history, community, governance and culture of Schaghticoke for the first half of the 20th century. With no action and a 10 to 12 year wait, the ability for those examining our petition to discuss first hand with those who were first hand participants of the daily life of the Tribe will be virtually nil. Although we have done interviews with a number of our elders which are documented and included in our petition, I have been told by my legal counsel that should our case be appealed or if the Federal Court takes our case and tries the issue of recognition, those interviews would be worthless since the opposition would not have had an opportunity to cross examine the elders.

Finally, a number of my members are elderly, in need of better housing and most especially of better health care. The ability of us as a sovereign nation to achieve economic self-sufficiency and address the housing, health care and educational needs of our Tribal Members becomes, with each day, more critical.

The Schaghticoke Tribal Nation has been recognized by the Colony of Connecticut since 1699 and continuously by the State of Connecticut since the founding of our Nation (See Connecticut General Statute 47-59a(b)).

> We support S. 611, but would caution that any change in the procedures or system could only prolong the already ridiculous timeframe to achieve federal recognition. Further, without a significant increase in the appropriation line item, from the miniscule $900,000 now budgeted to a more realistic amount near $4.8 million as I indicated in my testimony, inadequate resources will continue the pathetic record of recognition seen over the past 15 years of 1.3 tribes per year. With the prospects of anywhere from 40 to 200 viable petitions to be reviewed, the question that needs to be addressed by the Committee is how do we accomplish this task in a reasonable timeframe of 1 to 2 years once a petition is submitted and deemed ready for active review.

I again thank you for the opportunity to address your Committee and make myself available at any time to meet and discuss further the issues facing my Tribe and the prospects for the workability of S. 611.

In Brotherhood,

Chief Richard L. Velky

Richard L. Velky
Chief

registered (TM)

PUEBLO OF SAN JUAN DE GUADALUPE
PO BOX 16243
LAS CRUCES, NM 88004

Statement of
LOUIS ROYBAL, GOVERNOR,

on behalf of the
PIRO/MANSO/TIWA INDIAN TRIBE,
PUEBLO OF SAN JUAN DE GUADALUPE,
LAS CRUCES, NEW MEXICO

Submitted to the
SENATE INDIAN AFFAIRS COMMITTEE

Regarding
S. 611,
INDIAN FEDERAL RECOGNITION ADMINISTRATIVE PROCEDURES ACT

May 24, 2000

The Piro/Manso/Tiwa Indian Tribe, Pueblo of San Juan de Guadalupe of Las Cruces, New Mexico is honored to submit this testimony on S. 611, the Indian Federal Recognition Administrative Procedures Act, on behalf of the people of our tribe.

The Piro/Manso/Tiwa Indian Tribe descends from three aboriginal tribes -- the Piro, the Manso and the Tiwa -- whose ancestors were from the Mogollon and Mimbreno cultures of central and southern New Mexico. Piros and Tompiros abandoned their Pueblos in Salinas Valley in the late 1600s due to Spanish incursions, peonage, drought and famine. During the Pueblo Indian Revolt of 1680, the Spanish relocated the Piros

along with the Tiwa Indian captives from Isleta Pueblo to the Catholic Missions in what became the El Paso del Norte area of Texas. The Mansos, who already had settled in the Mesilla Valley and northern Mexico by the time of European contact, were forced to live at Guadalupe Mission in Juarez, Mexico around the same time. Before the signing of the Treaty of Guadalupe Hidalgo, our Caciques, or traditional religious leaders, relocated 22 Piro, Manso and Tiwa families to the territory of what became New Mexico and Las Cruces.

The genealogical evidence submitted in our petition shows that each of the 206 tribal members on the Tribal Roll derives from one or more of these 22 distinct full blood Piro, Manso, and / or Tiwa Indian lineages. In addition, today more than 75% of enrolled tribal members reside within the 8 square mile area in or near the old community in Las Cruces, near the plaza and home of the Cacique, our religious leader.

The Piro/Manso/Tiwa Tribe, although unrecognized, is a traditional Pueblo -- the only one in the administrative process for recognition. As a traditional Pueblo, we have our own Indian military and civil governing structures. Our Cacique, who serves for his lifetime, carries the core of thousands of years of tribal traditions and ceremonies. The position of Cacique is documented in Spanish, Mexican and American records as being in my family for 300 years, or since the late 1700's. My father served as Tribal President for over 25 years, and my uncle was the Cacique from 1935 until his death in 1978. Their father, my grandfather, is cited in the Las Cruces newspaper as the "Cacique of the Pueblo Indians in Las Cruces" in 1908. It was during his tenure, from 1890 to1910, that the Tribe received Federal services as an Indian tribe, and when over 110 children from our Pueblo were taken to Indian boarding schools in Albuquerque, Santa Fe, California, Oklahoma, and Arizona, even over the objections of their parents, because they remained "in tribal relations." In addition to our traditional structure, since 1965, we have had a Tribal Council form of government, which combines the administrative and traditional offices of the Pueblo under the guidance of the Cacique.

The Piro/Manso/Tiwa Tribe offers the following comments on the process for federal recognition and S. 611, the Indian Federal Recognition Administrative Procedures Act.

The first is that the current recognition process in the Branch of Acknowledgment and Research (BAR) within the Bureau of Indian Affairs (BIA) is lengthy, literally taking generations. In 1971, a man who was to become a Congressman and Secretary of the Interior, Manuel Lujan, encouraged me to work to put together the Tribe's story and to petition the federal government to recognize us. The Tribe submitted a documented petition to the Department of the Interior in 1971, and submitted a revised petition under 25 C.F.R. Part 83 in 1992. We have submitted sufficient documentation to the BIA to qualify

for "active consideration" of our petition, and we are currently seventh on the list of petitioners who are ready and waiting for "active consideration."

Secondly, the federal acknowledgment process is too expensive. Where is an impoverished unrecognized tribe supposed to get $1 million for professional services needed to make it through the process? The current process too often forces tribes to mortgage their future by finding investors that will benefit from economic development opportunities once the tribe is recognized. However, tribes are then criticized or ridiculed for finding financial supporters. Accusations are made that the tribe is seeking recognition only for financial gain. However, the tribe is merely trying to find the necessary resources that the process demands. Also, most of the financial assistance that an unrecognized tribe receives from either grants or private investors usually does not have any short term impact or direct benefit since money is spent on legal services and social science research. In other words, funds are rarely spent on the local community during the recognition process since most consultants are non-tribal members who do not reside in the local area. Unrecognized tribes have very few options when it comes to finding the money necessary to pay for the recognition process.

Thirdly, as the Committee may know, many aspects of Pueblo life -- our traditions and ceremonies, our religious practices and sites -- are traditionally not revealed to outsiders. To do so is a violation of our traditions and our elders' teachings. This is true of our Pueblo. The Piro/Manso/Tiwa Tribal Council, war captains and tribal community debated long and hard about whether or not tribal members could or would publicly talk about a wide range of issues that the BAR process requires any petitioner to address, and whether to allow others to investigate, write up, and disclose to non-members the kinds of information that is required in our petition. Much of the information required by the BAR about our traditions, our leaders, the highly personal and sensitive internal governmental issues in which the Tribe has been involved, we have documented in our petition ONLY at great cost and personal risk for the individual members and because without such evidence, we cannot prove the mandatory criteria for recognition. We as a tribal community have suffered when the information in our petition has, on occasion, been released by BAR to outsiders.

Not only are unacknowledged tribal religious leaders asked to disclose sacred sites, ceremonial practices, and sacred knowledge in order to prove the cultural validity of the people, which goes against every instinct and norm which says that this information is not to be shared, filmed, or recorded in any way. Unrecognized tribes are also asked to document very personal, private, sacred, painful, personal, family, clan information which no other person in the United States is forced to disclose. Petitioners are asked about family memories and information about deceased individuals which may include memories of abuse, abandonment, or other family problems. There is never any thought given to

what the emotional effects are of asking people to recall these memories for the public record.

While we understand the goal of the current acknowledgment criteria which require evidence of social interaction and political influence and participation, the criteria are inherently flawed since social interaction or the existence of community life is 1) very difficult to quantify; 2) highly subjective; and 3) may be a poor or insignificant indicator of a tribe's activity. How can people within a tribe prove to the BIA (in terms that they feel is sufficient) whom one talks to, interacts with, or has ties to on a daily, weekly, monthly, and yearly basis? At what level does a conversation or interaction become proof of tribal existence? And then at what point does a lack of conversation or interaction mean that a tribe does not exist? Who decides and what guidelines are being used to make these decisions? The benchmarks or theoretical paradigms should be consistent, based on scientific indicators, and made public.

Under the criteria, unrecognized tribes are essentially required to be more functional than any other society in America. Unrecognized tribes are supposed to have high levels of political participation and interaction across family lines that perhaps no federally-recognized tribe in the country has. On any given reservation or Indian community, neighbors who live two or three houses away from each other may not interact with each other for months or even years. On larger reservations, people may not even know who lives 20, 30, or 40 miles away and may never interact with that person, whether they be a family member or not. The truth is that sometimes people just don't like each other and choose not to talk to one another. This is true for unrecognized tribes also. But for an unrecognized tribe, people not liking each other or not talking to each other for personal reason can be taken by the BAR to prove that a tribe does not exist.

In the area of political participation, in the United States only 33% of the people on the average vote in the presidential election. Sometimes the candidates do not receive a majority of the vote. This means that the President of the United States can be elected by less than 15% of the people in the country. Does this mean that the United States of America is not really a sovereign nation or that it does not have a working government? Unrecognized tribes are like any other community; however, BIA assumes that political apathy on the part of some tribal members proves that there is no tribal government and therefore the tribe does not exist. This is highly flawed.

Turning specifically to the legislation, while we strongly support the intent of S. 611 to make the process for acknowledgment fairer and more streamlined, we are concerned that the procedures, timeframes and deadlines in the bill seem to reflect the doubtful presumption that there is no difference between the burdens and tests prescribed in the current 25 C.F.R. Section 83 process and S. 611. Under S. 611, sec. 5(a)(3), "all petitions

pending before the Department" would be transferred to the new Commission. Fourteen petitions are now on active consideration before BAR, some of whom already have a preliminary determination and are awaiting a final determination, or are in litigation. Eleven are waiting for active consideration, while another 47 petitions have been submitted in part but remain incomplete. There also are 103 letters stating their intent to submit a petition, but lacking adequate documentation. While many of these groups have documentation, many have not assembled this material in a coherent narrative form that would comply with 25 C.F.R. Section 83, let alone with S. 611, and it is unlikely that many of these petitioners have conducted as yet the complex social networking analysis which would show they meet the mandatory criteria under the current 25 C.F.R. Part 83 process. It is very likely that many of those candidates who now have only letter petitions, regardless of the merits of their cases, will never be able to complete a petition in eight years, and that it will not be possible for the Commission to process their petitions in twelve years.

Meanwhile, those whose petitions are ready and awaiting active consideration today may also have problems with the transfer of their petitions to the Commission, due to the truncated timelines and increased burdens S. 611 would impose. The primary advantage the Act offers petitioners is an independent Commission and staff that would process our petition, instead of the BAR staff. To us it appears that S. 611 may require a petitioner to go back and reorganize, relabel or redraft, or even redact materials, and then amend and resubmit narratives, documentation and exhibits to make sure these petition submissions fit properly within the new format and new regulatory requirements to be developed by the Commission on Indian Recognition. While emphasizing that petitioners remain responsible for their own research tasks, S. 611 as written would allow the Commission to do additional research by its own staff to extract quantitative data from petition submissions. The staff may need to do substantial work to reorganize petitions transferred from BAR in order to conduct analysis consistent with new regulatory requirements under the Act. The S. 611 process would impose substantially different evidentiary burdens on petitioners, and in many cases, would require petitioners not only to amend, but essentially to redraft their petitions during the narrow 90-day period allotted for the transfer of certain petitions from BAR to the Commission.

For example, under S. 611, the statement of facts regarding identification as an Indian entity actually goes back further in time -- to 1871 -- than the current regulations. 25 CFR 83.7 (a) requires evidence that the petitioner has been identified as an Indian entity on a substantially continuous basis only since 1900. In many cases, petitioners that were advanced in their research by 1994 have provided BAR with the evidence they need to meet the tests of identification, political existence and community activity back to 1871 or earlier, knowing that the BAR could decide to challenge the petitioner based on what happened before 1900. However, by moving the goal posts back to 1871 for proving community / political continuity in S. 611, Congress will virtually assure that petitioners who

may be ready for active consideration under the present rules at 25 C.F.R. Section 83 (1994, with procedural changes of February 11, 2000) will not meet the 90-day deadline for amending or submitting petitions that S. 611 imposes for its purposes. For many petitioners, this change would require more work, greater risk, and less likelihood of success.

By contrast, one difference between S. 611 and legislation introduced by Delegate Faleomavaega, H.R. 361, is that the House bill uses the date 1934 for identification as Indian, community and political influence. The date 1934 was selected by a working group of non-recognized tribes. According to the Senate bill, that date would not be acceptable.

At the National Archives in Record Group 75, Records of the BIA, Central Classified Files, Records of IRA Reorganization, 4894-1934-066, Anthropology Section, is a set of scholars' responses to Questionnaire of November 20, 1933, Part 10-A. The BIA sent out a survey and accumulated this set of anthropological studies and survey responses, and relied on them to determine which Indian entities were eligible to reorganize under the Indian Reorganization Act. Many of those "studies" were superficial and marginally informative. If tribes were left out of consideration for reorganization because the BIA ignored them in 1934, particularly on the basis of these "studies," the threshold should be moved to1934.

Under S. 611, the petitions under active consideration would remain with the Department; the BIA would transfer the rest to the Commission, which would start work at once on those petitions waiting for active consideration. Sec. 6(a)(2)(B) of the bill would give petitioners with letter petitions only 90 days to submit an "amended" or completed petition. Otherwise, they have to start all over under the new process, and complete the submissions in eight years under Section 5(d), and the Commission would have to act no later than 4 years later. It seems not unlikely that the crest of the wave of submissions could hit the Commission at or about the eight year limit, and at that point, facing fixed deadlines for acting on the petitions then pending, the Commission could easily choke on paper. Perhaps something should be done to address these petitions that consist of letters of intent only, as opposed to documented petitions, with a separate set of deadlines, if that is possible. Otherwise, this Act would provide closure for the United States and opposing third parties, not for the petitioners.

The intent of the February 11, 2000 changes in BAR procedures approved by the Assistant Secretary - Indian Affairs appears to be to limit circumstances in which a petition could languish. Under S. 611, cases which are transferred from BAR will be accelerated on a parallel track before the new Commission. If the perception is wrong that the February 11, 2000 changes to the BAR procedures will accelerate the processing of petitions still pending before BAR, it might be necessary to transfer the remaining petitions

which are on active consideration before BAR at the effective date of the Act to the Commission in order to finish them properly.

Another point is that the role of "interested parties" in the Federal acknowledgment determinations is reflected throughout the portions of S. 611 that address processing, and all levels of appeal of cases. At Section 6 (2)(b), Special Provisions for Transferred Petitions -- Others, the bill provides: "In addition to providing the notification required under subsection (a), the Commission shall notify, in writing, the Governor and attorney general of, and each federally recognized Indian tribe within, any State in which a petitioner resides." At (c) (2), Opportunity for Supporting or Opposing Submissions, (A) provides that each notice published under paragraph (1) shall include, in addition to the information described in subsection (a), notice of opportunity for other parties to submit factual or legal arguments in support of or in opposition to, the petition. Under (B), "A copy of any submission made under subparagraph (A) shall be provided to the petitioner upon receipt by the Commission," and at (C), "The petitioner shall be provided an opportunity to respond to any submission made under subparagraph (A) before a determination on the petition by the Commission." Section 7 deals with processing, and (a)(3)(B) allows the consideration of any submissions by interested parties in support of or in opposition to the petition. Section 8 (a), providing for a preliminary hearing on petition submissions, provides that "the petitioner and any other concerned party may provide evidence concerning the status of the petitioner." Within 30 days, under (b)(1)(A), the Commission shall make a determination to extend Federal acknowledgment as an Indian tribe to the petitioner, or under (B), a determination that provides that the petitioner should proceed to an adjudicatory hearing.

There appears to be a great and explicit solicitude without qualification toward the concerns of third parties in S. 611. Third parties / interested parties should have something definite at stake in order to get involved in a recognition determination. Under the present process, it is far too easy for thin, libelous, and untested claims to be accorded inordinate weight against a petitioner.

A related weakness of the current process is that on occasion, third parties consisting of "rump groups" or splinter groups claiming some association or right of affiliation with the petitioner can make claims to be the petitioner, or against the petitioner, and virtually derail a petition. The BAR process also has accorded the claims of such "rump" or splinter groups varying degrees of credibility. However, BAR offers little practical alternative to disposing of such claims except to consider them simultaneously. Once a tribe goes on "Ready" or "Active Consideration," another party can claim the petition as their own. They can obtain large portions of the petition submissions under the regulations and the Freedom of Information Act, then resubmit it (with some or few revisions) as their own.

In our own case, we have pressed for protection of the privacy of our individual members and of our cultural heritage, and gradually negotiated with BAR to protect these materials, relying not only on 25 C.F.R. Section 83 and the Privacy Act of 1974, but on such things as the limits imposed on the Tribe's use of sensitive materials by applicants for membership at the time they signed privacy waivers as part of the Tribe's membership application process.

Of the tribes on "Active" and "Ready" before BAR today, there are several splits and factions; and instead of requiring new factions to start over in the process, the BIA simply adds their petition to "Ready" or "Active" list, which means the new factions get to bypass all of the other tribes. The result may be the recognition of two opposing groups, but more likely will be the denial of both, unless the original petitioner is extremely fortunate. Perhaps it would be more equitable that when any "new" factions (groups that formed as recently as the most recent amendments to the 25 C.F.R. Section 83 regulations, February, 1994), or if a group "withdraws" from an original petitioner and wants to be considered for Federal recognition, it should be mandatory that the new group start at the bottom of the process. Practically speaking, this may be impossible without injustice to the petitioner with paramount claims, regardless whether their petition was submitted or completed first.

Third parties that deliberately submit what proves to be knowingly false or misleading testimony against a petitioner should be held liable for such false representations. Earlier versions of acknowledgment reform legislation discouraged such misrepresentations in third party claims or submissions against petitioners. At present, our alternatives include lengthy litigation or perhaps the remedy of prosecuting third parties for mail fraud.

Finally, Section 3 (26) of S. 611 defines "treaty," but does not seem to make the definition broad enough to include agreements between tribes and colonial or territorial governments that were predecessors to the U.S. government. It says:

(26) TREATY- The term "treaty" means any treaty–
(A) negotiated and ratified by the United States on or before March 3, 1871, with, or on behalf of, any Indian group or tribe;
(B) made by any government with, or on behalf of, any Indian group or tribe, from which the Federal Government subsequently acquired territory by purchase, conquest, annexation, or cession; or
(C) negotiated by the United States with, or on behalf of, any Indian group in California, whether or not the treaty was subsequently ratified.

The term "treaties" should include executive orders, and other documented alternative agreements or arrangements, and be consistent with the international conventions regarding agreements and arrangements alternative to treaties between indigenous peoples and colonial governments. The 18 unratified treaties the United States made with California Indian tribes provide well-known examples. Because the United States historically created reasonable expectations on the part of Indian tribes that they were subject to Federal jurisdiction, Congress should revisit such cases as instances of previous unambiguous Federal recognition. Where the Secretary and the BIA decided without congressional action to remove all Federal supervision and services from such groups, their acknowledgment should be expedited.

The final point we wish to make is that the status of an unrecognized tribe is that of second class in many ways. One particular example for Piro/Manso/Tiwa is the Native American Graves Protection and Repatriation Act or "NAGPRA." The Piro/Manso/Tiwa Tribe is culturally affiliated with and lineally descendant from the Piro Pueblos and cultures of the Salinas Pueblo Missions National Monument in Mountainair, New Mexico. Several years of discussions with the Monument led to the reburial of three partial Piro Indian human remains at Gran Quivira, which is part of Salinas Pueblo Missions Monument, in 1995.

However, last summer, Salinas Monument abruptly ended these discussions when they were advised that they do not have to include Piro/Manso/Tiwa in discussions regarding the reburial and repatriation of the Piro remains and objects of cultural patrimony held by the Monument and remains located at the San Diego Museum of Man, because we are not recognized. Instead, federally-recognized tribes will determine the disposition of those remains, even though 90% of the remains at Salinas are Piro.

Recently, in California, the Choinumni Tribe, Wuckchumne Tribe, Wuksache Tribe, and Dunlap Band of Mono have been fortunate in obtaining the cooperation of neighboring and culturally-related tribes in their efforts to secure the return of bones and funeral items for reburial when requested. Where such cooperation is not available, particularly where neighboring tribes are traditional foes of a Federal acknowledgment petitioner or a terminated tribe, the NAGPRA Review Committee only tells such a group to come back when they are recognized. Meanwhile, while the recognition process drags on, opposing parties can see to it that the remains and funerary items are disposed of against the interests and wishes of the petitioner or terminated tribe. This interpretation of the intent of NAGPRA does nothing to advance the interests that NAGPRA was intended to serve.

Having suffered the inequities and detriment of Federal recognition in the past -- when two generations of Piro/Manso/Tiwa children were forcibly removed from their homes and sent to Indian boarding schools -- only to be pushed off the table like an abandoned stepchild, we deserve the opportunity to pursue our own destiny and protect our heritage as a federally acknowledged Indian Tribe, and that is what we ask of this Congress. The Piro/Manso/Tiwa Indian Tribe, Pueblo of San Juan de Guadalupe, thanks you for the privilege of the invitation to submit testimony on this important legislation.

PIRO-MANSO-TIWA INDIAN TRIBE

REGISTERED (TM)

PUEBLO OF SAN JUAN DE GUADALUPE, NEW MEXICO

CERTIFICATION

I, the undersigned Governor of the Piro/Manso/Tiwa Indian Tribe, Pueblo of San Juan de Guadalupe, Las Cruces, New Mexico, as attested by the duly elected and on the authority of the governing Tribal Council of the Piro/Manso/Tiwa Indian Tribe, Pueblo of San Juan de Guadalupe, Las Cruces, New Mexico on this 20 day, of May, 2000, approved the foregoing Tribal Council Resolution by a vote of 8 For, 0 Against and 0 Abstaining.

Approved: _____
Louis Roybal, Governor

_____
Erminda Eres Marrujo, Lt. Governor

_____
Edward Roybal, Casique

_____
Esperanza Garcia, Secretary

_____
Andrew J. Roybal, 1st War Captain

_____
Holly Roybal, Treasurer

_____
Pablo Garcia, 2nd War Captain

n/a
_____
Julian J. Garcia, 4th War Captain

n/a
_____
Edward Roybal II, 3rd War Captain

_____
Joseph Parra, 5th War Captain

registered (TM)

PUEBLO OF SAN JUAN DE GUADALUPE
PO BOX 16243
LAS CRUCES, NM 88004

11 June 2000

Honorable Ben Nighthorse Campbell, Chairman
United States Senate
Committee on Indian Affairs
Washington, D.C. 20510-6450

Subject: Senate Committee on Indian Affairs follow-up questions on testimony given by the Piro/Manso/Tiwa Indian Tribe on S.611 on May 24, 2000

Honorable Chairman Campbell:

Enclosed are the comments of the People of the Piro/Manso/Tiwa Indian Tribe, Pueblo of San Juan de Guadalupe in response to the follow-up questions requested by Senate Committee letter dated May 25, 2000.

We want to thank the Committee for giving us the opportunity to present testimony on this important legislation. The People of the Pueblo support and urges this Committee and Congress to pass Senate Bill S.611.

Sincerely,

For the Piro/Manso/Tiwa Indian Tribe,
Pueblo of San Juan de Guadalupe:

Louis Roybal, Governor

PIRO-MANSO-TIWA - RESPONSES TO FOLLOW-UP QUESTIONS TO MAY 24TH HEARING ON S. 611

1) YOU SEEM TO SUPPORT THE IDEA OF AN INDEPENDENT COMMISSION, BUT NOT THE IDEA OF TRANSFERRING "ALL PETITIONS" TO THE NEW ENTITY. WOULD YOU SUPPORT A CHANGE IN THE BILL THAT GIVES PENDING PETITIONERS THE OPTION TO TRANSFER TO THE NEW COMMISSION?

Section 5 (3) TRANSFER OF PETITION provides:

(A) IN GENERAL- Notwithstanding any other provision of law, not later than 30 days after the date on which all of the members of the Commission have been appointed and confirmed by the Senate under section 4(b), the Secretary shall transfer to the Commission all petitions pending before the Department that--
(i) are not under active consideration by the Secretary at the time of the transfer; and
(ii) request the Secretary, or the Federal Government, to recognize or acknowledge an Indian group as an Indian tribe.
(B) CESSATION OF CERTAIN AUTHORITIES OF SECRETARY- Notwithstanding any other provision of law, on the date of the transfer under subparagraph (A), the Secretary and the Department shall cease to have any authority to recognize or acknowledge, on behalf of the Federal Government, any Indian group as an Indian tribe, except for those groups under active consideration at the time of the transfer whose petitions have been retained by the Secretary pursuant to subparagraph (A).

S. 611 at Section 5 (3)(B) therefore eliminates secretarial "authority to recognize or acknowledge, on behalf of the Federal Government, any Indian group as an Indian tribe, except for those groups under active consideration at the time of the transfer whose petitions have been retained by the Secretary pursuant to subparagraph (A)."

In order to provide petitioners the option to transfer to the new Commission, Congress would have to make major revisions in the current transfer section of S. 611. Section 5 (3) of S. 611 would have to be revised, essentially to leave the Secretary's acknowledgment and status clarification authority intact, and presumably, the Branch of Acknowledgment and Research's acknowledgment functions in operation, for sufficient time to allow petitioners adequate opportunity to prepare for the transfer. Mr. Mark Tilden's testimony on S. 611 (p. 7) suggests, "Subsections 5(a)(3)(A) and (B) should be amended to provide for the transfer of all pending petitions to the independent Commission or to give those petitioners under active consideration the option of remaining with DOI or transferring to the Commission." This language would provide a choice many petitioners will find essential.

2) YOU SAY THE TIME-FRAMES IN S. 611 ARE TOO TIGHT, ARGUING THAT THOSE THAT HAVE FILED "LETTERS OF INTENT" TO PETITION CANNOT COMPILE THE NECESSARY DOCUMENTATION IN 8 YEARS. BUT SOME OF THESE LETTERS WERE FILED IN THE MID-1970S -- ONE FILED IN 1976 -- ISN'T 24 YEARS + 8 MORE UNDER THE PROVISIONS OF S. 611 ENOUGH TIME TO COMPILE THE DOCUMENTATION?

If the sunset provision for the submission of petitions that first appeared in Senate acknowledgment legislation in the early nineties had become law, it is not unlikely that a number of the tribes that await Active Consideration, or that remain on the "Ready" list, never would have become acknowledged by the deadline. S. 611 may assure that some petitioners will stay at the bottom of the list and probably never will become acknowledged.

While the equities regarding the clarification of tribal status appear to be on the side of unacknowledged tribes, S. 611 would put closure for the United States well ahead of fairness to petitioners. Accelerating the processing of petitions alone does not resolve all the problems of petitioning, or assure that petitioners will be able to complete the S. 611 process in eight years.

The question whether eight years is enough time to complete the process under S. 611 assumes that the costs of petitioning, petition requirements, and present impeding conditions surrounding the petitioning process will drastically improve. The costs of petitioning and the time restrictions in S. 611 alone will eliminate many petitioners, because they will never be able to marshal or maintain their resources within eight years. Other limiting factors include the death or unavailability of tribal leaders and elders, as well as scholars and governmental officials who are the repositories of institutional memory. For a number of petitioners, the eruption of factions with the encouragement, if inadvertent, of the BIA has delayed and complicated their petitioning process.

For these and other reasons, even petitioners who already had been petitioning for more than 70 years at the time the FAP process began in 1979, including the Piro-Manso-Tiwa, only now are reaching the front of the queue of the 1994 version of the administrative process, for reasons largely beyond their control. An unknown but significant number of petitioners are understood to be unambiguously previously acknowledged, both in the sense of the 25 CFR 83 process and the S. 611 process, bypassed by IRA and other dispensations for acknowledgment. There was no provision for accelerating petitions until 1994. While providing for the acceleration of previously-recognized tribes through the process is helpful, in no case has the BAR approved an accelerated case based on previous recognition without having a full petition that would have survived the regular process, though a number of accelerated negative determinations happened in the first year alone. The imposition of absolute time limits on petitioners' completion of the

process will virtually assure the failure of a number of petitions, at least in part because of the eight-year limit alone, and the elimination of the majority of petitioners through the imposition of the eight-year limit is a moral certainty.

H. R. 361 takes into account the differences among petitioners regarding their state of preparedness and available resources, and offers the following alternative:

> *SEC. 6. NOTICE OF RECEIPT OF PETITION AND LETTERS OF INTENT.*
>
> *... (b) LETTERS OF INTENT- As to letters of intent, publish in the Federal Register a notice of such receipt, including the name, location, and mailing address of petitioner. A petitioner who has submitted a letter of intent or had a letter of intent transferred to the Commission under section 5(a) shall not be required to submit a documented petition within any time period.*

3) YOUR STATEMENT SUGGESTS THAT THE COST OF THE PROCESS IS SO HIGH THAT INDIAN GROUPS ARE FORCED TO SECURE FINANCIAL BACKERS, SOMETIMES CASINOS, TO SUPPORT THE DRIVE FOR RECOGNITION. CAN YOU ENLARGE ON THAT STATEMENT?

The administrative acknowledgment process has required petitioners to devote vast quantities of community resources that many petitioners have only begun to muster, and to make considerable sacrifices. Out of desperate necessity, unacknowledged tribes have had to seek ways to finance their petitions, including grants, in-kind contributions of labor and materials from members, contractors, and others, and profit-making enterprises, and creative financing. Many petitioners, and those who have provided in-kind contributions to their acknowledgment efforts, have mortgaged their futures, spent their retirement nest eggs, or otherwise sacrificed their personal security, just to get through the process.

When other avenues are exhausted, petitioners who otherwise prefer not to engage in gaming ventures find themselves reluctantly seeking resources from outside developers and other financial entities. Petitioners that do not want or do not approve of gaming (officially, as a government and community) may suffer attacks on their petitions by tribal and non-Indian third parties in order to deter competition.

In some cases, governments of petitioning tribes are weakened by the burden of the petitioning process, and "rump groups" and/or "splinter groups" arise, and third parties

with little, if any, real connection with or concern for the petitioner, attempt covert takeovers to displace the petitioner due to gaming interests.

Many federally recognized tribes and non-Indian third parties view acknowledgment candidates only as potential competitors, both for Federal dollars and other sources of income, and are willing to spend enormous amounts of money to see that no potential competitor survives, even in states far removed from the petitioner. While the present process purports to be apolitical, outside pressures and influences are exerted on the process. Opponents of unacknowledged tribes are vocal, well-organized, and politically focused at the local and national level against unrecognized tribes regardless of their status and regional locations.

Competition is inherent in both the 25 C.F.R. 83 and the S. 611 process in the financing of petitions. The S. 611 process provides no changes in the role of interested third parties in the process, and indeed expands and encourages their participation in the review of the petition process. Unacknowledged tribes are burdened with heavy financial expenses to support their advocacy, and must find resources to complete the documentation for a successful petition.

While competitive grants would be available under Section 17, the question remains as to whether such competitive grants ever would allow more than a handful of petitioners to gain access to such funds, let alone survive the S. 611 process.

The existing administrative process itself has created a rivalry for survival among petitioners which the S. 611 process inevitably would exacerbate in an end-game struggle. Contract funding currently available through ANA is available only on a highly competitive basis, and not all tribes submitting ANA proposals receive funding. This is a point about which even acknowledged tribes have complained. Funding from non-profit foundations and similar private sources also is scarce.

Finally, the integrity of the S. 611 process must be safeguarded from the mistakes and pitfalls of the 25 C.F.R. 83 process.

Testimony of Leon Jones, Principal Chief
And
Dan McCoy, Tribal Council Chairman
Eastern Band of Cherokee Indians
Cherokee, North Carolina

On S. 611, the Indian Federal Recognition Administrative Procedures Act of 1999

Presented to the Committee on Indian Affairs of the United States Senate
Washington, D.C.
May 24, 2000

Chairman Campbell, Vice Chairman Inouye, Distinguished Members of the Committee on Indian Affairs, my name is Leon Jones and I have the honor of serving as the Principal Chief of the Eastern Band of Cherokee Indians of North Carolina. I am accompanied today by Dan McCoy, the Chairman of our Tribal Council and by George Waters, a consultant in Washington, D.C. who has worked with us for many years.

It is truly an honor to appear before this Committee. Before I get into the substance of today's hearing, I want to thank the Committee Members, and particularly Senators Campbell and Inouye for the many years and countless hundreds of hours you have put into protecting the rights of this country's first citizens. We know that there are more glamorous issues that would get you more publicity, more power and even more votes back home than would ensuring this country lives up to its obligations to Indian tribes. We also know that there is nothing that will give you a greater sense of satisfaction than your efforts on behalf of the Indian people of this great country. To Senator Inouye in particular, who has chaired more hours of hearings on Indian issues than any one in the history of the United States Senate, I have always wanted to publicly read a quote from Felix Cohen that I am reminded of when I think of your career here. This is not the famous miner's canary analogy that we have heard before but is one that is particularly appropriate for you:

> If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who were never Indians and never expect to be Indians fight for the Indian cause of self-government, we are fighting for something that is not limited by accidents of race and creed and birth; we are fighting for what Las Casas, Vitoria and Pope Paul III called the integrity or salvation of our souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes which should carry us through many defeats.

I can not match the beauty of the words of the grandfather of Indian law, but I can and will again say thanks to you both.

Recognizing Tribal Governments, not Indians

The issue of federal recognition of Indian tribes is one that has perplexed this Committee for many years and by now you know that there is not going to be a simple answer or easy bill to pass. However, it remains the absolute strongest conviction of the Eastern Band of Cherokee Indians that we must distinguish between two key issues that we think continue to cloud the landscape is this area. With all due respect, we believe that even the very title of S. 611 adds to the confusion. This bill is called "the Indian Federal Recognition Administrative Procedures Act of 1999" (emphasis added). In fact, Mr. Chairman, this legislation is not about procedures that will recognize individual Indians, it is about procedures that will recognize long-standing tribal governments and we urge the Committee to always keep this distinction foremost in your minds as you deal with this matter. Because the bills refer to the federal recognition of "Indian[s]," many members of congress may have the impression that it is somehow a reaffirmation of certain people's "Indianness" or some sort of affirmation of social standing. Perhaps members of congress would be more understanding of the concerns of federally recognized Indian tribes if the bill was given a title that more accurately reflected what it would in fact accomplish - for instance:

> *The Establishment of Procedures to Award Sovereign Status to Descendant Groups of Indian People as Fully Functioning Units of Government Independent of State Authority.*

While such a title might be somewhat sensationalist (and would undoubtedly lead to the bill's prompt demise), it is not at all an exaggeration of what the legislation will accomplish. At the very least, we urge this Committee to refrain from using the phrase "Indian recognition" and instead begin to routinely use the phrase "Federal Tribal Recognition," terminology that we will use throughout the remainder of this testimony.

Let us make no mistake about what Federal Tribal Recognition of non-recognized groups of Indians means. Upon the award of federal recognition, an Indian tribe is empowered with significant authority that they could not previously exercise, and an official government-to-government, fiduciary trust relationship is established on the part of the United States for the tribe. Federally recognized tribes become sovereign units of tribal government. Sovereignty allows for self rule and control. Sovereign tribes have the authority (and responsibility) to establish their own police forces and judiciaries, and to incarcerate those who have violated tribal law. They can tax both individuals and businesses on their reservation; they can and must establish membership criteria; they can contract with the United States to perform obligatory federal services; establish hunting and fishing seasons and regulations independent from state regulations; and they can be granted Treatment as a State (TAS) status under numerous federal environmental laws including the Clean Water Act and the Clean Air Act. And of course, the unfortunate reality of the day is that the sovereign right to conduct high-stakes gaming overshadows all of these other authorities in the minds of many. It is important to remember that these are not powers granted to the tribe by the United States but are powers inherent to Indian tribes as units of

government that long preceded the existence of the Federal government or any state. By awarding federal tribal recognition, the United States is agreeing that the entity in question is a long standing and historic tribe whose self-governing authority must be recognized and reaffirmed.

It is therefore critical to Indian tribes that federal tribal recognition of heretofore non-recognized tribes be undertaken in a very deliberative and methodical fashion. If tribal recognition is attained via any sort of an inexact process, the very concept of a special and unique tribal government-to-government relationship and of tribal sovereignty is demeaned and diminished. There are already too many enemies of tribal governments out there who want us destroyed. We can not hand them any ammunition suggesting that our relationship with the United States is anything but solid and historical.

Current Petitioners for Federal Tribal Recognition

There are non-recognized Indian tribes in the United States that absolutely should have been previously recognized and through unfortunate historical twists of fate have not been (such as those tribes in California that signed treaties which were not subsequently ratified by the Senate in part due to the greed associated with the California Gold Rush). However, there are also many groups seeking recognition that by even the most liberal standards absolutely do not qualify as historic Indian tribes. The federal government is tasked with the difficult job of distinguishing between the "wannabes" and the legitimate groups. This is particularly problematic for the Eastern Band of Cherokee Indians, as a large number of the petitioning groups use the word "Cherokee" in their name. Below is the list of groups that have actually petitioned the Bureau of Indian Affairs for Federal Tribal Recognition who either use the word "Cherokee" in their name or who claim to be Cherokees:

The Amonsoquath Tribe of Cherokee of Missouri
The Cherokee Indians of Georgia
The Cherokee Indians of Hoke County, North Carolina
The Cherokee Indians of Robeson and Adjoining Counties of North Carolina
The Cherokee Nation of Alabama
The Cherokee Nation West - Southern Band of the Eastern Cherokee Indians of Missouri and Arkansas
The Cherokee-Powhattan Indian Association of North Carolina
The Cherokees of Jackson County, Alabama
The Cherokee of Southeast Alabama
The Chickamauga Cherokee Indian Nation of Arkansas and Missouri
The Etowah Cherokee Nation of Tennessee
The Georgia Tribe of Eastern Cherokees, Incorporated
The Langley Band of the Chickamogee Cherokee Indians of the Southeastern United States of Alabama
The Lost Cherokee of Arkansas and Missouri
The Northern Cherokee Nation of Old Louisiana Territory of Missouri

The Northern Cherokee Tribe of Indians of Missouri
The Old Settler Cherokee Nation of Arkansas
The Ozark Mountain Cherokee Tribe of Arkansas and Missouri
The Red Clay Inter-tribal Indian Band of Tennessee
The Sac River and White River Bands of the Chickamauga-Cherokee Nation of Arkansas and Missouri, Incorporated
The Southern Band of Eastern Cherokee Indians of Missouri and Arkansas
The Southeastern Cherokee Confederacy, Incorporated of Georgia
The Southeastern Indian Nation
The Tuscola United Cherokee Tribe of Florida and Alabama
The Western Arkansas Cherokee Tribe
The Western Cherokee Nation of Arkansas and Missouri
The Wilderness Tribe of Missouri

And last but not least, our favorite:

The Northwest Cherokee Wolf Band of Oregon.

This last group, apparently unfazed by the loss of thousands of their brothers and sisters on the Trail of Tears, decided that getting to Oklahoma was only a warm-up, so they evidently just kept walking all the way to Oregon!! What I have just read is the list of actual petitioners. When Wilma Mankiller was the Principal Chief of the Cherokee Nation of Oklahoma, she put together a list of groups numbering close to 200 that claimed to be Cherokee from all across the country. I am attaching that list for the record.

Equally troubling are the Hollywood Indian names that the Chiefs of these so-called tribes have given themselves: "Little Bear," "Red Falcon," "Pale Moon," "Black Wolf," "Straight Arrow," "Swift Coyote," "Shining Bear," "Walking Bear," "Silver Badger," "Falling Star," "White Eagle," "Morning Dove," etc., etc., etc.

There is not a month that goes by when I am not approached by someone who claims that their great grandmother was a Cherokee, if not a Cherokee Princess. When it is an individual, I usually just smile and say, "That's nice." If people want to relish having some Indian ancestry - imagined or otherwise - I am not going to lose sleep over it. What does cause me great concern is when we hear these claims of being a legitimate Cherokee Tribal government. We have had major problems with such a group in Georgia particularly after the Georgia State Legislature granted them state recognition. Last year, this group convinced so many people in suburban Atlanta that they would soon be opening a casino that Congressman Barr actually sponsored an amendment on the floor of the House of Representatives to prohibit the Secretary from implementing the long delayed gaming regulations that apply when states refuse to negotiate in good faith under IGRA.

Mr. Chairman, while this matter can get excessively scientific with fine points that only a genealogist could appreciate, it also has to make sense to the Indian people. In my state of North Carolina we have well known groups seeking recognition that can not speak a

single word of their claimed Indian language, that can not repeat to you a creation legend that is unique to their people, that have no dance, or song, or burial practice that is unique to their claimed tribe. Even if you found a one hundred year old member of their group, he or she could not speak to you in that tribe's language because it never existed. What is it that we are preserving in this case? What would this "tribe" do that would be unique or different from any small town government? These are not insignificant questions.

Retaining Existing Criteria

Obviously, the United States must have a process in place to deal with the many petitioners and it is unfortunate that they can not merely discard the ones that are obviously fraudulent. Without research, how are they going to make that distinction? We were involved from the very beginning in working with both the United South & Eastern Tribes (USET) and the National Congress of American Indians (NCAI) and the Bureau of Indian Affairs (BIA) in coming up with the present system. We believe that the United States must have very exacting criteria and we believe that petitioners should be required to produce evidence that clearly shows they have met that criteria. The present regulations ensure a process based on an adherence to academic, legal, historic, sociological, anthropological and genealogical principles. For that reason, we strongly support the provisions of S. 611 that retain the existing criteria that the BIA has used since the Federal Acknowledgement Process (FAP) began in 1978. We also support the provisions of S. 611 that use the year 1871 as an historic benchmark from which the petitioner must demonstrate origin. We are amazed that the House bill, H.R. 361, requires only a demonstration of existence since 1934. The year 1932 is hardly a proper benchmark for concepts like "historical" or "continuous" (as in "extending from the first sustained contact with Euro-Americans"). The criteria in S. 611 are consistent with the original Cohen criteria and have withstood the test of time.

BAR Workload Realities and the Exaggeration of the so called "Backlog"

We doubt that many independent anthropologists or historians would argue with the results of what the Branch of Acknowledgement and Research (BAR) has done to date, i.e., those 15 groups that have been granted recognition deserved it and those 15 that have been denied it, clearly were not, and are not, historical tribal governments. The principal criticism that both the Congress and petitioners have had of the BAR is the fact that it is a very slow moving process. There are a total of 237 petitions that have been received since the BAR process was first implemented in 1978. The critics of BAR always point to this ever-growing number and then state that if the BAR has been able to dispose of only 30 petitions thus far (actually 46 including those that have been resolved through other means), that it will take until the next century before they are through. What has always bothered us about this argument is that the vast majority of the so-called "petitions" for recognition are nothing more than letters of intent. Even the BAR's harshest critics would not want the BAR to make judgements on whether to award or deny federal tribal recognition to these groups because if they did, every single one would be denied as they have submitted no documentation on which to base the assertion of being a tribe. When letters of intent are submitted to the BIA they are given a number and those numbers are then factored into the

total numbers of so called "pending petitions." Presently, out of the total of 237, there are 166 petitions that the BAR has correctly deemed "not ready for evaluation." Out of that 166, there are 103 that are letters of intent with no documentation, 47 that are still responding to the BAR's request for more information, and 10 that are no longer in touch with the BIA at all. Surely, the BAR can not be criticized for not having acted on these. The bottom line here is that there are only 25 completed petitions before the BAR that are either in the "active status" category (14) or are ready to placed in that category (11).

The valid question has been posed as to why it takes so long for the BAR to process petitions that are active. We believe there are three principal reasons. First and foremost, the BAR office is absurdly understaffed. They properly consider a research team needed to process a petition to include at least one historian, one anthropologist, one genealogist and a secretary. Presently, they don't have enough staff for even three full teams. The Administration and the Congress are, once again, nickel-and-diming an Indian program and then complaining about the results! What is noteworthy is that discussions in the 105th Congress with Congressional staff contemplated creating a federal Commission to deal with this issue and having that Commission staffed with at least 25 professionals. Depending on whether that number included secretaries, it could staff from six to eight research teams. If that is what is anticipated, we suggest giving the present BAR enough FTEs to have six to eight teams and we are quite sure you will see a radical increase in the number of petitions that are processed annually.

The second reason is takes so long is that the staff are extremely methodical in going over petitions and the petitions often contain thousands of pages of background material that can not be quickly researched. We hope that the BAR will always be very methodical because if they were not the consequences would be very serious. An example of this is a previous BAR petitioner group calling itself the Mowa Choctaw of Alabama. This group, among other things, claimed to be descendents to the Choctaw Treaty of Dancing Rabbit Creek, which, understandably, greatly angered our good friend Phillip Martin from the Mississippi Band of Choctaw Indians. After six months of genealogical research, the BAR found that the Mowas' claims were astonishingly flawed. Almost all of the Indians the petitioners claimed as ancestors were in fact not their ancestors and people, who in fact were their ancestors, were not Indians. Only 40 of the 4,000 present day "enrolled" Mowa could show any descent from an Indian person. The Mowas were eventually denied recognition but had this extensive research not been undertaken, their fallacious claims would not have been discovered. Prior to this the Mowa had convinced their Congressman to introduce a bill for them awarding them legislative recognition whereby they are required to prove nothing at all. None of the bills that have provided legislative recognition have required any demonstration of meeting the well-accepted criteria.

An additional reason why the BAR process is becoming bogged down is through an ever-increasing number of legal proceedings and Freedom of Information Act (FOIA) requests which are taking hundreds of hours of staff time that could otherwise be spent researching petitions. We have been told that the BAR received over 80 FOIA requests in 1999 that involved the review of over 20,000 pieces of paper. We think this Committee

should ask the BAR staff about these proceedings. An instructive discussion of some of these legal proceedings can be found on page 7052 of the Federal Register of February 11, 2000. There are also unusual situations over which the petitioners have more control than does the BAR. For instance, the Shinnecock Tribe of New York was the fourth tribe to submit a letter of intent when they wrote to the BAR in 1978. Their petition has still not been processed. Why? Because for only reasons they can explain, the Shinnecock's waited 20 years until 1998 until they submitted documentation. We have heard that they were advised not to submit a completed petition during the era of the Reagan Administration. If true, we think they received some bad advice.

Sunsetting the FAP

Another provision in S. 611 on which we concur is the idea of having an end date (in this case eight years) by which all entities desiring recognition must have submitted a petition. There must an end in site for this process and of course we are supposedly only dealing with long standing, historical, Indian tribes. The fact that there were 40 petitioners when this process started and that 197 groups have submitted petitions since 1978 is significant. It is also significant that there were 16 new tribal petitions submitted in 1999. Let's remember that when the BAR process was first implemented, the BIA instituted a "locator project" wherein, with the help of professional anthropologists, the Bureau contacted over 100 known non-recognized groups across the country and informed them of the new BAR process and told them how to petition. We are now seeing petitions from groups that no professional anthropologist has ever heard of and which were not even identified by the Task Force on Unrecognized Tribes of the American Indian Policy Review Commission. Anyone who thinks there is no connection between groups that have just petitioned for the first time in 1999 and the notoriety from Indian gambling is delusional. It is a fact that there are casino interests behind some of the petitioners. Does any one really think that the ten petitioners from the state of Connecticut – including three in the last three years - have nothing to with the gaming success enjoyed by the Mashantucket Pequots? So yes, there absolutely should be a sunset provision by which all petitions must be submitted. We are not sure why that should take another eight years.

A New Commission Would Politicize the FAP

Mr. Chairman, while we agree with the concept of a sunset on petitions and the life of the Commission, our thoughts on the idea of creating a new Federal commission are that if you like the National Indian Gaming Commission, you are going to love the Commission on Indian Recognition!! Basically, we think it is a bad idea with no sound justification. An argument made by the proponents of a new Federal Commission is the allegation that there is a built-in conflict of interest within the Interior Department, which causes a predisposition against granting federal tribal recognition to unrecognized groups. We have seen no evidence that this allegation is true, and in conversations with BAR staff, have confidentially asked them if they have been pressured from within (i.e., from the Office of Policy, Management and Budget, the Office of the Secretary, the Office of the Assistant Secretary or even from the OMB) to not recognize a petitioner. We have been told by BAR staff that no

such pressure has ever been applied. The fact that the BAR granted tribal recognition to the San Juan Paiutes over the strong objections of the Navajo Nation, the largest and most powerful tribe served by the BIA and one with significant influence over the Bureau, is a good indication that the FAP has far more integrity than its critics allege.

We also have a difficult time swallowing the argument that a federal commission will somehow create a less political environment than presently exists with BAR's professional staff. If we have a conservative President, the odds are that we will end up more conservative Commissioners. Conversely, a more liberal President will likely lead to more liberal Commissioners. Bringing the consent of the Senate into this process also ensures a more – not a less – politicized process. Look at the stalemated situation we have in the Senate today with nominations. Do we really want to bring federal tribal recognition into this morass? Do people truly believe that establishing a new Federal commission will expedite the processing of petitions? How many years did it take before the National Indian Gaming Commission was really in business? How long will it take to get the Commissioners appointed, to get the Commission staffed, to find offices, furniture, to promulgate regulations, etc. etc. My prediction is that the processing the petitions will be delayed by at least five years through the establishment of this Commission and again, for what? To ensure a less politicized process than is alleged to exist presently? As a response to the totally unfounded allegations (most often from those who cannot meet the criteria) that the BAR staff is everything from arbitrary and capricious to racist and anti-Indian? If the Congress dedicated the same amount of money that it will cost to set up and staff this Commission to a thoroughly and professionally staffed BAR and set a five year deadline for completion, you would get ten times the bang for the buck than you would by implementing Section 5 of S. 611.

Complaints Against the BAR

We also find little merit in the criticisms of the BAR that they are dogmatic, entrenched and unwilling to change or accept input from experts and the Congress. In late 1991, the FAP office published in the Federal Register a series of revised regulations intended to respond to concerns about interpretation and administration of the review process. Public input was sought on these changes, including nine public meetings in various parts of the country. Sixty-one written comments were received on the proposed revisions, and many of these comments were heeded and incorporated into the revised regulations that were finalized on February 25, 1994. The comments received by the FAP office are most instructive. There is little question that the revised regulations clarified standards for acknowledgement (recognition), defined more clearly the standards of evidence, reduced the burden of proof for those demonstrating previous acknowledgement, and made various procedural and definitional improvements. William Sturtevant, editor of the Handbook of the North American Indian and an expert in the BAR process has commented that the changes made in 1994 have been very helpful and responsive to the needs of petitioners. More recently, on February 11, 2000, the BAR issued a new directive that is intended to free up more of the time of the professional staff of BAR and in so doing, enable them to process petitions more expeditiously. In the past, BAR staff have actually done substantial additional

research to supplement a petitioner's research where there were deficiencies. Under this new directive, BAR staff will only research a petitioner's claim to the degree needed to verify and evaluate the materials presented. It is obviously a little early to determine what kind of impact this new directive will have but is most certainly will expedite work in processing petitions.

It is also noteworthy that the critics of the BAR tend to be representatives of petitioners that have not succeeded in the BAR. To the contrary, the Tribal Historian for the Mohegan Tribe of Connecticut - a successful petitioner - has written to the Indian Affairs Committee and stated, "During this final stage of the federal recognition process, the second team of new BAR staff was entirely supportive, completely professional and very fair. We wish to commend BAR staff for their administrative handling of the resolution of this process." The same letter also states, "Throughout the course of these two [ANA] grants, the BAR maintained open lines of dialogic communication with the tribe."

An Alternative to Consider

Perhaps the Committee should examine the establishment of an advisory committee or outside panel to oversee the BAR office before you throw the baby out with the bath water. If you do create such an advisory committee, we strongly suggest that no one be allowed to sit on the committee that has a client seeking recognition before the BAR. We would also like to respectfully urge Chairman Campbell and Vice Chairman Inouye to invite the entire BAR professional staff to your office for an off-the-record rump session on what it is that they do. We are quite convinced that you will have a very different perspective of these people when you do hear directly from them, as opposed to only hearing from those who have much to gain by convincing you of the staff's ineptitude. Don't invite the Assistant Secretary or the Head of Tribal Government Service but just talk freely with the folks whose job it is to decipher truth from spin. I can assure you it will be a most educational experience.

Conclusion

The FAP or BAR is working better than both the conventional wisdom and those with axes to grind would have you believe. Fund it and staff it properly, and put some time pressure on both petitioners and BAR staff, and we'll be done with this chapter of the relationship between the federal government and the tribal governments that preceded it. Thank you.

Groups purporting to be Cherokees. Compiled under the Administration of Principal Chief Wilma Mankiller, Cherokee Nation of Oklahoma, July 1995.

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Chief Dave

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Pramon Weaver - some members claim to be of Cherokee descent

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Sovereign Cherokee Nation of Tejas AKA Omni Technology Foundation
Bill Fry, Jr. AKA Chief Bear Who Walks Softly
George Monaghan AKA George Black Bear
Wise Otter AKA Dallas Bessant
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Paul "Gator" Norman

Southeastern Cherokee Confederacy, Blue Band
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Edwin "Silver Hawk" Sarver, Chief

Southeastern Cherokee Confederacy, Crow Band
Ocala, FL
Norman "Running Buck" Buford, Chief
Betty "White Dove" Buford

Southeastern Cherokee Confederacy, Long Hair Band
Tallahassee, FL
Joan "Snowberry" McAra

Southeastern Cherokee Confederacy, Many Lakes Band
Wachula, FL or Lakeland, FL
Mabel "Sage Woman" Boone
William M. "Elkheart" Griffin

Southeastern Cherokee Confederacy, Pine Knot Clan
Tarpon, FL

Southeastern Cherokee Confederacy, Rattlesnake Band
Bradenton, FL
Wm. Chuck "Red Bear" Smith

Southeastern Cherokee Confederacy, Turtle Clan
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Neal McCormick
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Delined to Acknowledge 12/21/1981 46 FR 61652
Some members claim to be of Cherokee descent

Southern Band of Cherokees and Creeks
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Jim "Little Hawk" R. Jackson, Clan Chief
Larry J. "Red Fox" Loper

Southeastern Cherokee Confederacy, Eagle Clan
Albany, GA
Allen "Lobo" Morris
Donald E. "Gator" Styck

Southeastern Cherokee Confederacy, Fire Clan
Macon, GA

Southeastern Cherokee Confederacy, Holly Clan
Dearing, GA
Robert "Little Bear" Smith
George "Fish Hawk" Smith

Southeastern Cherokee Confederacy, Lower Etowah Clan
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United Cherokee Nation
Charles "Little Eagle" Capach, Grand Council Head Chief

IDAHO

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AKA Delilah Whitecloud American Indian Council, Inc.
AKA Delilah Whitecloud Cherokee Tribe of Kentucky
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"Wounded Eagle," Chief

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Amonsoquath Tribe of Cherokee, Powhatan Clan
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(issues Certificates of Degree of Indian Blood)
which is greatly confused with the Bureau of Indian Affairs'
Certificate of Degree of Indian Blood)

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Lilly May TaWaNna Smith, Chief

NEW JERSEY

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"Medicine Hawk," Chief

NEW MEXICO

Cherokees of New Mexico
(membership is mainly of registered members of the Cherokee Nation,
here in Oklahoma, acts as a support group for tribal members located
in New Mexico, and is the only group supported by Tribal Resolution
11-85; does not purport to be the Cherokee Nation in any form.)

NEW YORK

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The Free Cherokees, Wolf Council
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Karen Thomas

Mary Trail of Tears Long House
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Southeastern Cherokee Confederacy
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NORTH CAROLINA

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Cherokee Indians of Robeson and Adjoining Coun
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Southeastern Cherokee Confederacy
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Some members claim to be of Cherokee descent
Determined ineligible to petition (

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OHIO

Etowy Cherokee
Hugh Gibbs

Tallige Cherokee Nation
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Cherokee United Intertribal Indian Council
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Ray Dalton
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Barbara Crandall - "Cherokee Elder/Grandmother of the Cherokee"

Char "White-deer" Hunter - "Cherokee spokesperson"

Alan Lewis -

Cher Schaffer - "Cherokee spokesperson"

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Declined to Acknowledge 11/26/1985 50 FR 39047

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Band, OR

Northwest Cherokee Wolf Band, Paint Clan
Salem, OR
Tom "Silver Bear" Hedgecoke
Winona "Morning Star" Cheatham

Southeastern Cherokee Confederacy
Medford, OR
"Comanche Wicasa, BlackStar"

Southeastern Cherokee Confederacy, Badger Band
Golden Hill, OR or Northern, OR
J.B. "Little Horse" Ruffman
Mrs. "Little Deer" Ruffman
Raymond "Wild Cat" Marang, Elder
Frank "White Eagle" Shehorn
Ruth "Morning Dove" Shehorn
Melvin "Bear" McCune
Janice "Rainbow" Cox
Jim "Lone Elk" Housley
Betty "Two Bear" Mathison
Joy "Two Feathers" Rowland

Southeastern Cherokee Confederacy, Paint Band
Salem, OR
William "White Eagle" Wilson
Winona "Morning Star" Cheatham

Southeastern Cherokee Confederacy, Wolf Band
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Declined to Acknowledge 11/25/1985, 50 FR 39047

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Cherokee Nation Limited
Herbert Williams, President "Little Bird on the Shoulder"

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"Utsidihi" Hicks, Principal Chief

Court of the Golden Eagle
His Royal and Imperial Majesty
The Oukah
Emperor of Tsalagi (the Kingdom of Paradise)
King of the Upper Cherokees
King of the Middle Cherokees
King of the Lower Cherokees
Keeper of the Ancient Traditions, and
Supreme God of the Sun
The Cherokee Nations
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WISCONSIN

Southeastern Cherokee Confederacy
Michael "Black Hawk," Vice Principal Chief

The Eastern Band of Cherokee Indians

The Honorable Leon D. Jones, Principal Chief
The Honorable Carroll J. Crowe, Vice-Chief

June 4, 2000

Honorable Ben Nighthorse Campbell, Chairman
Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, D.C. 20510

Official Response to Follow Up Questions For the Hearing Record

Dear Mr. Chairman,

Thank you for allowing me to testify on May 24th at your hearing on Federal Recognition. I believe that the issue I raised about the title of the bill is more than mere semantics and that all parties should begin using the phrase "Federal Tribal Recognition" instead of "Indian Recognition." Perhaps people will then think more about what a profoundly important issue this is.

I want to answer the follow up questions you posed to me in your letter of May 25 but I want to first return to an interchange you and I had at the hearing. After I had made my statement, you picked up on a point I had made and indicated that indeed, you too had met with a group seeking tribal recognition that had no Indian language, no tribal customs, no creation stories, no dances or songs, no Indian burial practices, etc. You stated that you asked them what they did have and they told you they had a corporation. You then went on to infer that it was the fault of the United States that these people had nothing of an Indian nature left in their lives because of past Federal policies that banned and even punished the practice of Indian language and custom. Mr. Chairman, the hearing was clearly being rushed along and I didn't want to take up too much of your valuable time but I do want to respond to your statement in this letter. My mother and Dan McCoy's (the Tribal Council Chairman who accompanied me) mother both were sent to BIA boarding schools where they experienced all the repressive tactics that you were referring to. No people were dealt with more brutally than the Cherokee were by the Europeans and early Americans. It was the practice in the southeastern United States to routinely kill Cherokee people and the majority of those who weren't killed were forcibly marched to Oklahoma on the infamous Trail of Tears, where one-third died during the march. We have intimate, first-hand experience with the very Federal tactics you were referring to yet, if you come to our homeland today, the Qualla Boundary, you will find thousands who still speak our language and who practice our unique customs.

Qualla Boundary • P.O. Box 455 • Cherokee, N.C. 28719
Telephone: (828) 497-2771 or 497-4771
Telefax: (828) 497-2952

Clearly, it is not impossible to have retained Indian customs and traditions and language, as every federally recognized tribe I know of still retains those things, even here in the east where we have been dealing with the white man for a couple of hundred years longer than have the tribes out west. Go up to Maine and you will see and hear the Passamaquoddy language spoken to this day, go down to Florida where the Seminole and Miccosukee have retained their culture and language, and go over to the Mississippi Choctaw Reservation, where 30 years ago an Indian could not even get his hair cut in the local city of Philadelphia, and you will find strong Indian cultural practices. We know very well about racism and cultural repression but in every case the culture was too strong to be killed.

The point you made does cause me to wonder about an aspect of this whole matter. For the sake of argument, let's say you are right and it was the repressive tactics of the United States that led to the cultural void evidenced in the group you were describing. Are you suggesting that a group of people seeking federal tribal recognition that have no Indian language, no Indian customs, no Indian dances or songs, no birth or death ceremonies, and no creation myths, are in fact still an Indian tribe? If so, what is it that makes them a tribe of Indian people? I think we will rue the day when we get into the practice of affording tribal acknowledgement to what are essentially non-Indian "Indians."

Let me now answer your questions. Your first question was whether I want to pull up the ladder on groups that have "legitimate claims" because I believe there should be a sunset in the FAP process and do not support the idea of the proposed Commission. I would not describe my motives in the somewhat selfish manner inferred in your query at all. The position of the Eastern Band of Cherokee has always been that if the group seeking federal recognition is in fact "legitimate," and if they can meet the criteria (which are not as onerous as the critics suggest), then they <u>should</u> in fact be afforded federal tribal recognition. We have opposed efforts to weaken – and in some cases totally gut – the criteria and we have opposed efforts of groups who want to totally circumvent the criteria by seeking legislative recognition where not one iota of genealogical, historical or anthropological criteria have ever been demanded. I offer my advice and observation, after over 20 years working with Indian tribes, that the Commission idea is simply not going to fix the problem. It will take years before the Commission is set up and operating and a politically appointed Commission will by its very nature become far more political than is the case with the present Branch of Acknowledgement and Research (BAR). Arlinda Locklear, who is the originator of the Commission idea, laid out the true nature of the push for the Commission when she stated that the criteria must be changed, i.e., weakened. I am convinced that you will see much better results if you staff up the existing

understaffed BAR, as opposed to spending millions of dollars to create another federal commission. Set up an advisory committee, set deadlines by which BAR must act, throw out all the ridiculous so-called "petitions" that have no documentation and you will see a far better end result than you will by establishing a commission.

It does seem to me that there should be an end point in this process, at the very least a date by which petitions must be submitted. As I stated, we are seeing petitions from groups that no anthropologist has ever heard of. If these groups are in fact long-standing tribes they should be able to get a petition in by a date certain. If you extend the FAP process for another 50 years you will get petitions from groups 49 years from now that none of us has heard of but who will nonetheless claim to have existed throughout history.

Your second question was whether my tribe would be negatively affected by the creation of additionally recognized tribes, given the limited universe of federal funds? The short answer is: probably not. There are already 350 federally recognized tribes in the lower 48 states and another 200 Alaska Native Villages that have tribal status. Therefore, with 550 tribes in this country already competing for underfunded BIA and Indian Health Service program dollars, I seriously doubt that the creation of another 10 or 20 federally recognized tribes would make a lot of difference. I also presume that the Appropriations Committees would add more funds to the budget for these new tribes.

With all due respect, I am afraid this question is intended to demean the legitimate concerns that federally recognized tribes have with gutting the existing process (i.e., changing the date to which petitioners must demonstrate they have existed to the year 1934 as proposed in the Locklear bill), by intimating that we are greedy and unconcerned with others. The overriding concern of federally recognized tribes has always been that the nature of federal/tribal relations. The legal foundations on which that relationship rests will be damaged if we start handing out federal tribal recognition by anything less than a methodical process using time-proven criteria. All other concerns come in a very distant second.

Your third question asks why, in light of the fact that groups seeking tribal recognition must get financial assistance in order to petition, I believe that a large number of these petitions are "only for gaming." With all due respect, I never said that a large number of groups seeking tribal recognition are doing it "only for gaming." Since you asked, however, just because a group seeks outside assistance doesn't mean that gaming <u>isn't</u> a motivating factor. I don't see the connection between needing outside financial assistance and whether gaming was

or was not a principal reason to petition. Clearly in the case of Governor Roybal's tribe, a group that has been desirous of recognition long before anyone ever heard of the Indian Gaming Regulatory Act, gaming has absolutely nothing to do with his petition.

What my testimony did say was, "Anyone who thinks there is no connection between groups that have just petitioned for the first time in 1999 and the notoriety from Indian gambling is delusional." (emphasis added). My testimony also stated, "Does anyone really think that the ten petitioners from the state of Connecticut – including three in the last three years – have nothing to do with the gaming success enjoyed by the Mashantucket Pequots?" Mr. Chairman, I stand by my statement. Are you suggesting that groups who didn't petition until 1999 and the multitude of petitioners in Connecticut are unmotivated by gaming? None of us should be so pollyannaish as to discount gaming in this discussion. There is a city in Georgia that is literally out trying to "find an Indian tribe" so they can open a casino on the theory that it will help that region's economy.

I do not believe that a large number of FAP petitions are only for gaming – particularly those that have been pending for a long time. I know that there are very legitimate groups seeking recognition for sound historical reasons, and no one should demean their desire by suggesting that they are only motivated by gambling dollars. That is one reason why we have historically supported funding for the Administration for Native Americans (ANA in HHS) to help groups fund their petitions and have lobbied in support of those funds. Having said that let me add that I unequivocally do believe that a number of the more recent petitions have gaming as a prime factor and I do believe that a number of the petitioners are unsubstantial. As I stated in my testimony, there are 28 groups seeking recognition using the name Cherokee. Rest assured, these are not legitimate long-standing Indian tribes.

In closing let me reiterate my point about the so-called "backlog" in petitions because it came up again at the hearing. Once again, we were left with the impression that there are over 200 in number and hence the inference that the BIA cannot do the job. There are not, no matter how you count it, 200-plus backlogged "petitions." The vast majority of these so-called petitions are nothing more than old letters of intent with no documentation. They were logged in and given a number just like a documented petition would be. With all due respect, I don't understand why the Indian Affairs Committee continues to participate in the effort to misinform the public on this point. Clearly you are not suggesting that the BIA should process these undocumented letters of intent, are you? Presently there are 166 petitions that the BAR has correctly deemed "not ready for

evaluation." Out of the 166, there are 103 with absolutely no documentation, 47 that are still responding to the BAR's request for more information and 10 that have completely lost contact with the BAR. There are 14 documented petitions in the "active status" category and 11 documented petitions that are waiting to be placed in that category. It is these 25 petitions in the later two categories that we should focus on, not the 200 plus number. I would support legislation that would require the BAR to process these petitions on a more expedited basis than is presently the case. That cannot, however, be done without adequate staffing at BAR, particularly in light of the litigious nature of our society and the ever increasing amount of time that the BAR staff must dedicate to litigation and FOIA requests.

Mr. Chairman, I want to thank you again for your great work in leading this important Committee. We all owe you and Senator Inouye a great deal of gratitude for your advocacy for the Indian tribes of this country. In this one area we may disagree but please know that 99 times out of 100 the Cherokee people are going to be right there with you. I appreciate your consideration of my views as discussed in both my testimony and this letter. Please do not hesitate to pose any further questions on this or other matters.

Sincerely,

Leon Jones
Principal Chief

cc: Hon. Daniel K. Inouye, Vice Chairman
Honorable Committee Members

Hearing on S. 611 - *The Indian Federal Recognition Administrative Procedures Act of 1999*

May 24, 2000

Statement Submitted on Behalf of the Mashpee Wampanoag Indian Tribal Council, the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Miami Nation of Indiana by the Native American Rights Fund

The Native American Rights Fund represents the Mashpee Wampanoag Indian Tribal Council, the United Houma Nation, the Shinnecock Indian Nation, the Pamunkey Tribe, and the Miami Nation of Indiana in federal recognition matters. We appreciate the opportunity to submit testimony on S. 611 - *"The Indian Federal Recognition Administrative Procedures Act of 1999"*. This statement is, in large part, based on our experience in representing the above, and other, tribes seeking federal recognition.

S. 611 is a response to the various problems that have been identified in the acknowledgment process established and presently used by the Bureau of Indian Affairs (BIA). Nonfederally recognized tribes are mindful and appreciative of your dedication and earnestly hope that your efforts will bear fruit this Congress in the form of a fair and reasonable federal recognition process for Indian tribes to replace the present burdensome, expensive and unworkable administrative recognition process. Our experience with the process convinces us that the present administrative process is beyond repair. Nothing less than a comprehensive remaking of the process by Congress can restore fairness and reason to the recognition process. We support the effort to deal with those problems. The bill provides solutions to some of the problems. We have recommendations as to the others and as to some parts of the bill itself.

RECOGNITION

When the United States establishes a government-to-government relationship with an Indian tribe, it is said to have recognized or acknowledged the tribe, Although the government recognized most of the presently federally-recognized tribes in historic times, it continues to acknowledge tribes to the present day. Under current law, both Congress and the Department of the Interior (Department or DOI) have authority to recognize tribes.

RECOGNITION PRACTICE

1. Congress

Congress recognizes tribes through special legislation. *See e.g.*, Act of October 10, 1980, 94 Stat. 1785 (Maliseet Tribe of Maine); Act of October 18, 1983, 97 Stat. 851 (Mashantucket Pequot Tribe of Connecticut), Act of November 26, 1991, 105 Stat. 1143 (Aroostook Band of Micmacs); Act of September 21, 1994, 108 Stat. 2156 (Little Traverse Bands of Ottawa Indians and the Little River Band of Ottawa). Congress reviews and acts on requests for special recognition legislation on a case-by-case basis.

2. Department of the Interior

Before 1978, DOI made acknowledgment decisions on an ad hoc basis using the criteria "roughly summarized" by Assistant Solicitor Felix S. Cohen in his *Handbook of Federal Indian Law* (1942 ed.) at pp. 268-72. In 1978, the Department issued acknowledgment regulations in an attempt to "standardize" the process. Both the process and the criteria established in the regulations were different than those used before 1978.

A. The Acknowledgment Regulations

In the 1970s various controversies involving nonrecognized tribes,[1] including an increase in the number of requests for recognition,[2] led the Department to review its acknowledgment practice. That in turn led to the promulgation of the 1978 acknowledgment regulations. 43 Fed. Reg. 39361 (Sept. 5, 1978) *presently codified* at 25 C.F.R. Part 83.[3] In publishing the regulations, the government explained that prior to 1978 requests for acknowledgment were decided on a "case-by-case basis at the discretion of the Secretary." 43 Fed. Reg. at 39361. The 1978 regulations were an attempt to develop "procedures to enable the Department to take a uniform approach" in the evaluation of the petitions. *Id.*

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[1] In 1972, the Passamaquoddy Tribe of Maine sued the federal government. The Tribe wanted the government to file a land claim on its behalf under the Indian Nonintercourse Act, 25 U.S.C. § 177, even though it was not then federally-recognized. *See, Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). In the mid-1970s, a number of nonfederally recognized tribes attempted to assert treaty fishing rights in the *United States v. Washington* litigation. *See, United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

[2] For example, the Stillaguamish Tribe requested recognition in 1974. When the Department of the Interior refused to act on the request, the Tribe filed suit. The federal district court in Washington, D.C. ordered the Department to make a decision on the request. *Stillaguamish v. Kleppe*, No. 75-1718 (Sept. 24, 1976). The Department recognized the Stillaguamish Tribe in October 1976.

[3] The proposed acknowledgment regulations were first published for comment on June 16, 1977. 42 Fed. Reg. 30647. They were redrafted and published for comment a second time on June 1, 1978. 43 Fed. Reg. 23743. They were published in final on September 5, 1978.

Under the 1978 regulations, groups submit petitions for recognition to the Assistant Secretary for Indian Affairs. 25 C.F.R. § 83.4. The petition must demonstrate all of the following "in order for tribal existence to be acknowledged": (a) identification of the petitioner as Indian from historical times; (b) community from historical times; (c) political influence from historical times; (d) petitioner's governing document; (e) a list of members; (f) that petitioner's membership is not composed principally of persons who are not members of any other North American Indian tribe; and (g) that petitioner was not terminated. 25 C.F.R. § 83.7(a)-(g).

Upon receipt of a petition, the Assistant Secretary causes a "review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe." 25 C.F.R. §83.9(a). Most of the technical review is carried out by the Branch of Acknowledgment and Research (BAR).[4]

The next step is active consideration by BAR. 25 C.F.R. § 83.9(d). The Assistant Secretary, through the BAR, then issues proposed findings for or against recognition. 25 C.F.R. § 83.9(f). [5] Petitioners have the opportunity to respond to the proposed findings. 25 C.F.R. § 83.9(g). After consideration of responses to the proposed findings, a final determination is made. 25 C.F.R. § 83.9(h). The Assistant Secretary's final determination is final unless the Secretary of the Interior requests reconsideration. 25 C.F.R. § 83.10(a).

B. Practice under the Acknowledgment Regulations

The process used to consider petitions under the 1978 regulations is not as simple as the regulations suggest. In response to discovery requests in *Miami Nation of Indiana v. Babbitt*, No. S 92-586M (N.D. Ind. filed 1992), the Department described the actual process used in processing petitions for recognition under the regulations.

Once a petition is placed on active consideration, a three person team is assigned to evaluate it. *Miami* Discovery Responses. The team consists of an anthropologist, a genealogist, and a historian. *Id.* Each member of the team evaluates the petition under the 25 C.F.R. Part 83 criteria and prepares a draft technical report.[6] *Id.* Evaluation of the petition consists of verifying

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[4] Technically, recognition decisions are made by the Assistant Secretary - Indian Affairs. Review of petitions and recommended decisions are made by the BAR staff (formerly called the Federal Acknowledgment Project).

[5] In a recent notice in the federal register, 65 Fed Reg. 7052, February 11, 2000, the BAR now says it will not accept new materials between the time a petition is placed on active consideration and the issuance of the preliminary determination. If any materials are received during this time, they will be "held for review during preparation of the final determination." 65 Fed. Reg. at 7053. Thus, even if the answer to an issue is in the materials submitted, it will be ignored until the preliminary determination has been made. This is inefficient and places petitioners at a serious disadvantage as they may be faced with trying to get an adverse finding reversed, a more difficult proposition than correcting a problem before a decision is made.

[6] Under the notice published in the federal register, these technical reports will no longer be prepared. "The AS-IA is directing that, except for current cases where the technical reports

the evidence submitted by the petitioners, supplementing the evidence submitted where necessary,[7] and weighing the evidence as to its applicability to the criteria. *Id.* The individual reports are cross-reviewed by each team member. *Id.* Preparation of the reports includes comparing the petition to past determinations and interpretations of the regulations. *Id.*

Following completion of the draft technical reports, there is an "extensive internal review, termed peer review". *Id.* Peer reviewers are other BAR professional staff not assigned to the case. The technical reports are reworked "until the professional staff as a group concludes that the report provides an adequate basis for a recommendation to the Assistant Secretary." *Id.*

After review and editing by the BAR chief, the acknowledgment recommendations and reports are subject to legal review by the Solicitor's Office and Bureau of Indian Affairs line officials up to the Assistant Secretary. *Id.* If those officials require more information or clarification, BAR typically provides the information through meetings. *Id.*

C. The 1994 Revisions to the Acknowledgment Regulations

In 1991, DOI proposed revisions to the 1978 regulations. 56 Fed. Reg. 47320 (Sept. 18, 1991). The revisions were not finalized until February 25, 1994. 59 Fed. Reg. 9280 (February 25, 1994) codified in 25 C.F.R. Part 83 (1999 ed.). In promulgating the revisions, the federal government stated:

> None of the changes made in these final regulations will result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations. Neither will the changes result in the denial of petitioners which would have been acknowledged under the previous regulations.

59 Fed. Reg. at 9280.

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have already been drafted, technical reports such as have been prepared in the past shall no longer be prepared to accompany the summary under the criteria." 65 Fed. Reg. at 7053. This places petitioners who have received a negative determination at a serious disadvantage because without the detailed technical reports, it becomes that much more difficult to know how and why the BAR arrived at its decision.

[7] Under the notice published in the federal register, the BAR is no longer allowed to conduct "substantial additional research" which often was done by BAR staff to supplement a petitioner's research especially when deficiencies remained after BAR provided technical assistance to the petitioner. 65 Fed. Reg. At 7052. This places some petitioners at a serious disadvantage because the present federal recognition process is expensive, in our experience ranging from $200,000 to over $1 million dollars, and petitioners have little or no financial resources to research, assemble, and submit a documented petition. Thus, it becomes more important for the Congress to adequately fund the Commission and the Administration for Native Americans at sufficient levels to carry out the Act and to give petitioners an opportunity to fully present a documented petition. Otherwise, some tribes that should be federally recognized will be denied such recognition.

The 1994 revisions specify the types of evidence that will be accepted to establish the two most troublesome criteria, community and political influence. These are listed in 25 C.F.R. § 83.7(b) and (c). They also include a special provision for determining whether a group was previously recognized and the effect of previous recognition. 25 C.F.R. § 83.8.

PROBLEMS TO BE ADDRESSED BY S. 611

There are a number of concerns with the Department's recognition practice under the acknowledgment regulations. Even before the present Departmental process was established in 1978, there was doubt that the Department and its Bureau of Indian Affairs could deal fairly with applicants for recognition. In addition, practice before the Department and BAR has shown a number of weaknesses in the procedures used to review and determine petitions. Those concerns, along with concerns about some of the provisions of S. 611 and proposed solutions are set out below.

1. Independent Decision-Making

One of the fundamental issues is who should make recognition decisions. Congress has the ultimate authority, but DOI has interpreted the general grant of rulemaking in 25 U.S.C. §§ 2 and 9 to allow it to do so as well. It was under those general statutes that the Department issued the existing acknowledgment regulations. The numerous oversight hearings on those regulations and the legislative attempts to change the Department's acknowledgment process have all indicated that it is questionable that DOI's Bureau of Indian Affairs, which manages the government's relationship with federally recognized tribes, can make an impartial decision on the recognition of "new" tribes.

In the years 1975 to 1977, the American Indian Policy Review Commission (AIPRC) conducted a review of "the historical and legal developments underlying the Indians' relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians." Final Report American Indian Policy Review Commission, Cover Letter (May 17, 1977). The review included a study of the status of nonrecognized tribes and resulted in reports and recommendations concerning recognition policy. *Id.* Chapter Eleven; Report on Terminated and Nonfederally Recognized Indians, Task Force Ten, AIPRC (October 1976). The AIPRC described the posture of DOI in making recognition decisions and expressed concern about the ability of the Department to deal fairly with nonrecognized tribes.

> The second reason for Interior's reluctance to recognize tribes is largely political. In some areas, recognition might remove land from State taxation, bringing reverberations on Capitol Hill. There also is the problem of funding programs for these tribes.
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> Interior has denied services to some tribes solely on the grounds that there was only enough money for already-recognized tribes. . . . Already-recognized tribes have accepted this 'small pie' theory and have presented Interior with

another political problem: The recognized tribes do not want additions to the list if it means they will have difficulty getting the funds they need.

Final Report AIPRC at 476.

Concern with impartiality has echoed in the various hearings on recognition that have been held since 1977. There is widespread apprehension that the Department, the Bureau of Indian Affairs, and BAR are subject to inappropriate political influence in making recognition decisions. *See e.g.* the Statement of Raymond D. Fogelson, Dept. of Anthropology, University of Chicago on S. 611 a Bill to Establish Administrative Procedures to Determine the Status of Certain Indian Groups Before the Senate Select Committee on Indian Affairs, 101st Cong., 1st Sess. 177 (May 5, 1989) ("While I respect the individual conscientiousness, competence, and integrity of members of B.A.R., I believe that an office separate from B.I.A. will be more immune to possible allegations of conflicts of interests or to the potential influence of Bureau policy and attitudes. It seems to me that the B.I.A. has enough to do in administering Federal Indian programs and serving the needs of the Indian clientele without also assuming the additional role of gatekeeper."); Deposition of John A. Shapard, Jr., former chief of BAR, in *Greene v. Babbitt*, No. 89-00645-TSZ (W.D. Wash.) at p. 33 ("there's a general, all-persuasive attitude throughout the bureau that they don't want anymore tribes"); *see also,* the Statement of Allogan Slagle in *Oversight Hearing on Federal Acknowledgment Process Before the Senate Select Committee on Indian Affairs*, 100th Cong., 2nd Sess. 198 (May 26, 1988) ("No matter how fair the BIA/BAR staff attempt to be, and no matter how they try to see that their decisions reflect a common standard, the perception of many tribes is that there are inequities in the way that the requirements are enforced.")

Those concerns persist to this day and taint the existing DOI recognition process. In the creation of a Commission and an adjudicatory process to rule on petitions for federal recognition, S. 611 solves half the problem in the current administrative process, that is, it requires an open decision-making process by a Commission that lacks the institutional biases of the BIA. Because its mission is to serve federally-recognized tribes, the BIA is institutionally incapable of fairly judging non-federally recognized Indian tribes, particularly through the closed decision-making process currently employed by the Bureau. The creation of an independent Commission is an important step that gives non-federally recognized tribes at least the prospect of a fair assessment of their petitions.

We have two suggestions, however on this aspect of S. 611. Under Section 5(a)(3)(A) and (B), petitions that are under "active consideration" are retained and determined by the Department. If an independent Commission is warranted, it should apply to all petitions now before DOI. An alternative is to give those petitioners who are under active consideration the option of remaining with DOI or transferring to the Commission.

We suggest that the Committee consider one additional change to the provisions creating the Commission, that of adding to the end of Section 4(e)(1)(A) the following proviso: "provided that no individual presently employed by the Branch of Acknowledgment and Research, Bureau of Indian Affairs, shall be employed by the Chairperson." This limitation is not meant to imply bias or lack of qualifications on the part of any individual staff member at the Branch of

Acknowledgment and Research. It is unreasonable, however, to expect that those individuals, many of whom have worked under the dictates of the present acknowledgment regulations for years, could quickly adapt to the dramatically different decision-making process to be used by the Commission (and perhaps applying different criteria such as those suggested below.) To insure a smooth and expeditious transition to the new way of doing business, the Commission should be required to employ fresh personnel.

Proposed Changes to S. 611: Subsections 5(a)(3)(A) and (B) should be amended to provide for the transfer of all pending petitions to the independent Commission or to give those petitioners under active consideration the option of remaining with DOI or transferring to the Commission. Add to the end of Section 4(e)(1)(A) the following proviso: "provided that no individual presently employed by the Branch of Acknowledgment and Research, Bureau of Indian Affairs, shall be employed by the Chairperson."

2. Hearing Process

Under the process established in the acknowledgment regulations, it is technically the Department's Assistant Secretary - Indian Affairs that makes recognition decisions. The BAR staff, however, do all the work of reviewing petitions, independent research, and decision writing. That work takes a number of years and is, in large part, hidden from petitioners.

S. 611 makes a needed change from the DOI process. Formal hearings are provided in Sections 8 and 9. Such hearings will open the decision-making process thereby giving petitioners a much better idea of their obligations and more confidence in the ultimate decision. Such hearings will also focus the examination of the Commission and the staff in a manner that is completely lacking in the present process.

There are five matters that should be made more specific in Sections 8 and 9 of S. 611.

1) It should be made clear that the Commission itself will preside at both the preliminary and adjudicatory hearings. Under the DOI acknowledgment regulations, it is the Assistant Secretary - Indian Affairs that makes recognition decisions. The Assistant Secretary, however, is not involved in most of the work that leads to those decisions. The BAR staff reviews petitions, does additional research, and writes the recommended decisions. The Assistant Secretary signs off on those decisions. Although there is no doubt that staff will be necessary to aid the Commission in making decisions, the Commission should be much more involved in decision-making than the Assistant Secretary. One way to accomplish that is to make clear that it is the Commission that presides at all hearings.

2) It should be made clear that records relied upon by the Commission will be made available in a timely manner to petitioners. Both the present Departmental process and S. 611 include preliminary decisions to which petitioners respond. Our experience with BAR indicates that it is imperative to make clear that the Commission and its staff provide petitioners with the documents and other records relied upon in making the preliminary decision. In one case, DOI issued proposed findings on the United Houma Nation (UHN) petition in mid-December 1994. Under the acknowledgment regulations, UHN had 180 days to respond to the proposed findings.

BAR only began making records relative to the proposed findings available to the Houma Nation's researchers in April of 1995 for a response due June 20, 1995. It was past the June 20, 1995 deadline before most documents were received.

3) Congress should strengthen that part of Section 9 that allows the cross-examination of Commission staff. Presently, Section 9 provides for cross-examination of Commission staff but the Commission is not required to call staff to testify. All staff that worked on a preliminary determination should be required to testify and to be available for cross-examination. The historical, anthropological and genealogical determinations made on petitions for recognition are detailed and complex. The only valid way to test those determinations is to allow petitioners to cross-examine their authors. In addition to giving petitioners an effective way to determine what the Commission and its staff has done, it will force the Commission and its staff to focus its attention in the adjudicatory hearing. In testimony on H.R. 4462 (a bill very similar to S. 611), Karen Cantrell, an anthropologist and attorney who has worked as a contract anthropologist for BAR, expressed her views of needed changes in the recognition process.

> Decisions reached in the Federal Acknowledgment Project will be more consistent and objective when petitioning groups can cross-examine experts and witnesses and review all research materials relied upon by decisionmakers. Cross-examination and review of research materials allows evidentiary facts and statements to be tested for reliability.

Written Testimony of Karen Cantrell on H.R. 4462 and H.R. 2549 at p. 3 (July 22, 1994) (emphasis added).

4) The bill should explain the precedential value of prior DOI recognition decisions and should make the records of those decisions readily available to petitioners. BAR has stated that it views its prior decisions as providing guidance to petitioners. It is very difficult, however, to get access to or copies of the records relating to those decisions or to get guidance from BAR as to the specific decisions it intends to follow in a given case. In one particular instance, for example, the Shinnecock Indian Nation submitted its petition in September, 1998 and subsequently met with BAR staff on March 1, 1999 to obtain technical assistance to strengthen its petition. The BAR staff advised the Nation's representatives to review two specific recognition decisions and federal court opinions. The Nation's representatives requested copies of those decisions and a list of those federal court opinions. BAR eventually provided the copies by March 2000 - a relatively simple task to begin with. It has yet, over a year later, to provide the list of federal court opinions. With the transfer of petitions to the Commission, the precedential value of BAR, and earlier Departmental decisions, should be explained with specificity. If those prior decisions are considered precedent, the records of those decisions should be promptly made available to petitioners.

5) The language in Section 9 referring to the APA should be clarified. The existing language is ambiguous.

Proposed Changes to S. 611: Section 8(c)(1)(A)(i) should be amended to state that all records relied upon by the Commission and its staff in making the preliminary determination shall be made available to petitioners including prior decisions relied upon and records relating to such prior decisions. Given the deadlines for hearings in the bill, those records must be available immediately. Section 9 (a) should be modified to provide that the adjudicatory hearing will be on the record pursuant to 5 U.S.C. §§ 554, 556, and 557. Section 9(b) should state that all Commission staff that worked on the preliminary determination and that assist the Commission in the final determination must be available for cross-examination.

3. The Criteria in S. 611

The criteria in the DOI acknowledgment regulations and in S. 611 are almost exactly the same.[8] The creation of the Commission only solves half the problem with the present administrative process. Under Section 5 of S. 611, the Commission would apply the same criteria to the determination of tribal existence as those applied in the present administrative process. As written and applied, the criteria in the present regulations are so burdensome and heavily dependent upon primary documentation that many legitimate Indian tribes simply cannot meet them. If these same criteria are applied by the Commission, the Commission will become overwhelmed in expensive and time-consuming examination of minutia, much of which is unnecessary to the determination of tribal existence. Worst of all, the Commission will fail to recognize legitimate Indian tribes, just as the BIA has done under the current regulations.

In 1995, this Committee heard testimony on S. 479 which was a bill almost identical to S. 611, including the criteria for federal recognition. Testimony by Arlinda Locklear, Esq. explained in detail the unreasonableness of the criteria. *See*, Statement of Arlinda Locklear, Esq. on S. 479, a Bill to Provide for Administrative Procedures to Extend Federal Recognition to Certain Indian Groups Before the Senate Committee on Indian Affairs, 104th Cong., 1st Sess. (July 13, 1995). We supported that testimony.

Today's testimony by Arlinda Locklear reiterates the unreasonableness of the current criteria and explains events that have since occurred. Those events have culminated in some of our concerns with the unreasonableness of the criteria being addressed in pending bill H.R. 361, a Bill to Provide for Administrative Procedures to Extend Federal Recognition to Certain Indian Groups, 106th Cong. 1st Sess. (July 19, 1999). As such, we believe the criteria in H.R. 361 are more reasonable.

We ask the Committee to assume full responsibility in establishing reasonable criteria, rather than abdicating its responsibility by simply enacting into law the BIA's acknowledgment regulations, and to consider the criteria in H.R. 361. If the Committee does consider the criteria, then S. 611 will move towards becoming a complete and effective resolution to deal with non-federally recognized Indian tribes.

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[8] In one respect, S. 611 is even more burdensome than the current acknowledgment regulations. Under criterion 25 C.F.R. § 83.7(a), the regulation requires the petitioner to demonstrate identification as an Indian entity since 1900. But S. 611, § 5(b)(1) would require such demonstration since 1871.

4. The Exclusion of Indian Groups Under Section 5 of S. 611.

Unfortunately, S. 611 would exclude Indian groups from the recognition process. That is unwarranted in the following respects.

A. Groups Denied Under the BIA Recognition Process

Section 5(a)(2)(C) excludes Indian groups that have been denied recognition under the Department's acknowledgment regulations.

S. 611, as presently written, is a significant change from the process under DOI's acknowledgment regulations. For that reason, it seems fair to let those groups denied under the regulations have at least one chance under the Commission.

Proposed Changes to S. 611: Section 5(a) should be amended to provide that groups that have been denied recognition under the acknowledgment regulations are allowed a hearing before the Commission. Section 5(a)(2)(C) should be deleted. Section 5(a)(2)(E) should be amended (if it is not deleted under another proposal we have made) to make clear that it does not apply to groups that have challenged BAR final determinations in court.

B. Groups Involved in Litigation

The Mashpee Example

Section 5(a)(2)(E) excludes some Indian groups that were involved in litigation raising tribal status issues in federal court. The situation of the Mashpee Wampanoag Tribe of Massachusetts illustrates the problems with this section. The exclusion of such groups cannot be justified.[9]

[9] DOI's acknowledgment regulations explicitly state that a petitioner that meets the requirements for recognition "shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes". 25 C.F.R. 83.12 (a).

During the time that the Department was promulgating the acknowledgment regulations, the Mashpee filed a land claim under the Indian Nonintercourse Act (NIA), 25 U.S.C. 177. [10] At that time, there was a moratorium within the Department of the Interior on the recognition of new tribes as DOI worked out its acknowledgment policy. Eventually, in June 1977, Interior published proposed recognition regulations. The Mashpee then requested a continuance of their land claim litigation based on the new regulations. The court declined but invited DOI to participate. The government chose not to do so. The land claim trial went forward and a jury found that the Mashpee Tribe was not a tribe for NIA purposes. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd* 592 F.2d 575, *cert. denied*, 444 U.S. 866 (1979).[11] However, because of the nature and circumstances of the Mashpee litigation, that decision should not bind the United States and prevent it from determining whether the Mashpee Tribe should be recognized.

As discussed above, the United States was not a party to the land claim litigation and, in fact, refused to take part in it. Thus, the Mashpee litigation and decision do not bind the United States. That is part of the reason that the United States has accepted and is reviewing Mashpee's petition based on a ruling by the Associate Solicitor for Indian Affairs.

In addition, the issue before the court in Mashpee was whether Mashpee met the requirements of the NIA. One of the requirements is that the plaintiff must show that it is a tribe under the common law standard of *Montoya v. United States*, 180 U.S. 261 (1901). "The formulation of this standard and its use by the federal courts occurred... without regard to whether or not the particular group of Indians at issue had been recognized by the Department of the Interior." *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2nd Cir. 1994) (emphasis added); *Joint Tribal Council of the Passamaquoddy Tribe*, 388 F. Supp. 649 (D.Maine 1975) aff'd 528 F.2d 370, 377 (lst Cir. 1975). Federal recognition and tribal status for NIA purposes are different matters.

The criteria that must be proved to show tribal status for NIA purposes and the criteria for recognition in S. 611 are not the same. Contrast the Montoya standard with S.611, 5(b). *See also Golden Hill*, 39 F.3d at 59 (Application of the *Montoya/Candelaria* definition and the BIA criteria, which are the same criteria used in S. 611 [9], "might not always yield identical results.").

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[10] Other recognized tribes also filed NIA land claims during this time. *See e.g. Narragansett Tribe of Indians v. Southern Rhode Island Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *Joint Tribal Council of the Passamaguoddy Tribe v. Morton*, 388 F. Supp. 649 (D.Main 1975) aff'd 528 F.2d 370 (1st Cir. 19757).

[11] Meanwhile, DOI finalized its recognition regulations establishing the Federal Acknowledgment Project (now called the Branch of Acknowledgment and Research) within the DOI. Mashpee talked to DOI about recognition and the Solicitor's office made a threshold determination that the Tribe was eligible for the process. Mashpee first prepared a documented petition in 1980. The petition was revised in 1990. The Tribe has spent over $400,000 over the 20 years that it has worked on a petition for recognition.

An examination of the Mashpee decision shows the difference in the tribal status determination made in that case and the recognition determination to be made under S.611. In Mashpee, the district court relied on the *Montoya* standard in instructing the jury on tribal status. The jury focused on dates relevant to the NIA land claims. They found that Mashpee was not a tribe in 1790, 1869, 1870, and 1976 but was a tribe in 1834 and 1842. The district court did not attempt to explain those findings. On appeal, the Tribe questioned how the jury could find that the Tribe went out of existence between 1842 and 1869. The Court of Appeals affirmed the district court decision, finding that the Tribe had voluntarily assimilated into non-Indian society during those years. *Mashpee*, 592 F.2d 575.

The Court of Appeals justified that conclusion as follows. The Court stated that based on the creation of the District of Mashpee in 1834 and the authorization to divide common Tribal land in 1842 the jury "could infer that the tribal organization, having accomplished its purposes, became less important to the community." *Id.*, 592 F.2d at 590 (emphasis added). The Court ruled that the jury could have found "the seeds of change to have been sown when division of the common land was authorized in 1842" and that "in and out migration" from 1834 to 1870 were "suggestive not so much of tribal cohesiveness and community as of individual aspirations and frustrations." *Id.*, 592 F.2d at 59091 (emphasis added). The Court also found support for the jury's verdict based on an 1869 legislative report that indicated a "split opinion" among members of the Tribe on whether to remove restrictions on alienation of Indian land and whether to seek citizenship. The desire of Mashpee residents to be able to alienate land, though not in itself inconsistent with tribal existence, could support the inference that the residents had begun to focus more on personal than communal advancement; more on the ability of individuals to compete as members of society than of the tribe to resist society's impositions. *Id.*, 592 F.2d at 591 (emphasis added). Finally, the Court stated that based on evidence that Tribal members worked in the local economy and that the town took over common land, the jury "could have inferred that Mashpee was voluntarily trying to carve a destiny like many another rural and coastal town; to change from an 'Indian community' to a community that happened to be made up largely of Indians." *Id.*

The Court's analysis is flawed. In the first place, the division of communal/tribal land, the removal of restrictions on alienation of Indian land, and the grant of citizenship to Indians have been unfailingly held to be consistent with continued tribal status. *Winton v. Amos*, 255 U.S. 373, 392 (1921); *Williams v. Johnson*, 239 U.S. 414, 420 (1915); *United States v. Noble*, 237 U.S. 74, 79 (1915); *United States v. Sandoval*, above at 48; *Tiger v. Western Investment Co.*, 221 U.S. 286, 312 (1911); *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *United States v. Celestine*, 215 U.S. 278, 291 (1909); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902). Thus the facts that Mashpee common lands were divided, and that some members of the Tribe favored the ability to alienate Indian land and the grant of citizenship could not, as a matter of law, have resulted in a loss of tribal status.

In order to affirm the jury's findings, the Court of Appeals was forced to find that the jury could have viewed the above facts as suggestive of a desire on the part of the Tribe to assimilate. In other words, there was no evidence of assimilation. There were simply facts, legally insufficient to show a loss of tribal status, but through which the jury could infer that had

occurred. It was on that slim and subjective basis that the federal courts ruled against the Mashpee Tribe on the tribal status issue.

The Houma Example

The decision in *United Houma Nation v. Texaco et al.*, (Civ. No. 97-4006, E.D. La.) was a contract based lawsuit which did not involve the question of tribal status. As such, there was no indication that the Court was destined to rule on tribal status. But it did rule on tribal status and its decision was based on a highly questionable, unrebutted 10-page affidavit. On the other hand, the BAR staff has reviewed over 10,000 pages of documents, conducted field interviews, examined significant genealogy material and more. The Tribe has also submitted significant research and genealogy in response to the BIA's proposed findings. Under these circumstances, the United States through the present BIA/BAR process or the proposed independent commission process should have the opportunity to make its own final decision concerning the tribal status of the Houma Tribe.

CONCLUSION

A decision like the Mashpee and Houma decision could not be made under the criteria proposed by S.611. Those criteria envision a completely objective determination of whether a petitioning group has shown that it meets the community and political leadership criteria. *See* S.611, 5(b)(2)(A) and (B), (3)(A) and (B). In fact, listed under each of those criteria are the types of specific evidence that can be used to establish the criteria over time and at "given point[s] in time". *Id.* Under S. 611, it would not be possible to conclude, as was done in *Mashpee*, that a group was a tribe but lost that status because it could be surmised that the group was "trying... to change from an 'Indian community' to a community that happened to be made up largely of Indians". *Mashpee* 592 F.2d at 591. And, it would not be possible to conclude, as was done in *Houma,* that a group was not a tribe based on a questionable, unrebutted 10 page affidavit.

The procedures used to make the tribal status decisions are entirely different. In the Mashpee litigation, a jury had to make its decision two days after the trial ended. In the Houma litigation a state court judge considered the affidavit. To the extent that the S.611 procedure is similar to that presently used by BAR, it would be very unlike the procedure in the litigation. A staff of professionals including, in all likelihood, genealogists, anthropologists, and historians would assist the commission in reviewing decisions. The review will be exhaustive. The qualitative differences between the way the tribal status issue was decided in Mashpee and Houma and the way recognition will be decided under S. 611 are enormous.("That inquiry " whether a group of Indians constitutes a tribe" is extremely intricate and technical.") *See, Golden Hill Paugussett Tribe v. Weicker*, 839 F. Supp. 130, 135 (D.Conn. 1993), *aff'd*, 39 F.3d 51.

For all of the above reasons, prior litigation like the *Mashpee* or *Houma* litigation should not preclude the United States from making a decision whether to recognize a tribe or not.

Subsection 5(a)(2)(E) takes the decision from Congress and the Secretary and gives it to the courts. Congress should not abdicate its responsibilities under the Constitution especially when the courts treat recognition as a political question and tribal status as an issue that should be dealt with in the first instance by DOI under the primary jurisdiction doctrine. Although some restrictions on the ability to petition for recognition under S. 611 are appropriate, subsection (E) is the only part of (5)(a)(2) that could restrict access to the process based on events that did not involve the United States.

Proposed Changes to S.611: Section 5(a)(2)(E) should be deleted.

Respectfully Submitted,
Mark C. Tilden
Staff Attorney
Native American Rights Fund

Native American Rights Fund
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12 June 2000

Via Facsimile # 202-224-5429

Senator Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington, DC 20510-6450

Re: Questions on S.611

Dear Senator Campbell:

I am writing to respond to your following questions on S.611:

1. You have been involved in recognition issues for years. Can this process be reformed with more funds, more staff and more time?

The process can be reformed by establishing an independent Commission that is funded and staffed at such levels that the Act can be carried out effectively. Currently, the Branch of Acknowledgment and Research is severely underfunded and understaffed. As the Assistant Secretary for Indian Affairs recently mentioned in his testimony on S.611 before the Committee: "I know it's unusual for an agency to give up a responsibility like this, but this one has outgrown us. It needs more expertise and resources than we have available." Hence, the Commission must be funded at realistic levels in order for the Commissioners to carry out the Act within the strict timelines contained in S.611.

In addition, it is important for the Congress to provide sufficient financial assistance to petitioners to enable them to fully research and document a petition. It has been our experience that petitions cost from $400,000 to over $1 million to fully research and document. Hence, the Administration for Native Americans (ANA) within the Department of Health and Human Services must be funded at such a level that they can give grants to petitioners sufficient to allow them to fully research and document a petition.

As the Assistant Secretary for Indian Affairs mentioned in his recent testimony on S.611: "I have reluctantly reached the conclusion that I will not be successful in reforming this program." As such, time is of the essence in moving forward to revamp the federal recognition process.

2. Do you believe that the new recognition regulations released in February 2000 will make a positive impact on the Federal Recognition process or will these also prove unhelpful?

The new recognition regulations make changes that are unhelpful. We believe that the changes will harm some nonfederally recognized tribes. They only make it easier for the Bureau of Indian Affairs to deny legitimate tribes Federal recognition. The research burden has been entirely shifted to the petitioners which is a significant change from the norm under the current regulations. The Branch staff is no longer allowed to conduct "substantial additional research" which often was done by Branch staff to supplement a petitioner's research especially when deficiencies remained after Branch staff provided technical assistance to the petitioner. 65 Fed. Reg. at 7052. Most petitioners lack the financial resources to fully research and document a petition and have come to rely on the Branch staff's norm under the current regulations of conducting additional research.

The new regulations are also inefficient in several ways. The BAR now says it will not accept new materials between the time a petition is placed on active consideration and the issuance of the preliminary determination. If any materials are received during this time, they will be "held for review during preparation of the final determination." 65 Fed. Reg. at 7053. Thus, even if the answer to an issue is in the materials submitted, it will be ignored until the preliminary determination has been made. This places petitioners at a serious disadvantage as they may be faced with trying to get an adverse finding reversed, a more difficult proposition than correcting a problem before a decision is made.

Also, technical reports will no longer be prepared in connection with BAR findings. 65 Fed. Reg. at 7053. This places petitioners who have received a negative determination at a serious disadvantage because without the detailed technical reports, it becomes that much more difficult to know how and why the Branch arrived at its decision. In order to know how and why the BAR arrived at its decision, a petitioner will have to file a Freedom of Information Act request and perhaps commence litigation.

In sum, the new recognition regulations are unhelpful and will harm some nonfederally recognized tribes.

3. In your testimony, you state that a new Commission created under S.611 should not employ any employees who currently work for BAR. Wouldn't the new Commission want some BAR employees to bring knowledge and experience to aid in the transition process?

No. There is a widely-held belief that the Bureau of Indian Affairs has an institutional bias against fairly treating non-federally recognized Indian tribes. That bias taints the existing federal recognition process which the current BAR staff has worked under for years. They appear to be entrenched in their way of doing business. As the Assistant Secretary for Indian Affairs mentioned in his recent testimony on S.611: "I have reluctantly reached the conclusion that I will not be successful in reforming this program." The limitation on the Commission to employ any employees who currently work for the Branch is to ensure a smooth and expeditious transition to the new way of doing business.

With kindest regards,

Mark C. Tilden
Staff Attorney

MCT/js

Testimony of Arlinda Locklear, Esquire
on S.611, before the
Senate Committee on Indian Affairs, May 24, 2000
on behalf of the Miami Nation of Indiana

Mr. Chairman and members of the Committee, I appreciate the opportunity to express my views on S.611, a bill to establish a commission for the processing of petitions for recognition of Indian tribes. This is an important bill that would have a dramatic impact on the Indian communities subject to its provisions, which communities are typically the poorest and least influential of all Indian country. The Chairman and Vice-Chairman of this Committee have personally committed much thought and energy to this subject. Non-federally recognized Indian tribes are mindful and appreciative of your dedication and earnestly hope that your efforts will soon bear fruit in the form of a fair and reasonable recognition process for Indian tribes to replace the present administrative recognition process.

I have a long-standing professional interest in this subject, having represented several tribes in the administrative recognition process since its inception since 1978. I have worked on successful petitions [e.g., Tunica-Biloxi Tribe of Louisiana] and unsuccessful petitions [e.g., Miami Nation of Indiana.] I have advocated reform of the administrative process before the Department of the Interior and the Congress. I have also represented tribes in court in various challenges against the administrative recognition process. I am currently co-counsel with the Native American Rights Fund and general counsel Albert Harker for the Miami Nation of Indiana in a lawsuit currently pending in federal court in Indiana, in which the Tribe challenges the Department's failure to acknowledge it. Miami Nation of Indians of Indiana v. Babbitt, (S92-586M, N.D. Ind.) I also have a personal interest in this subject as an enrolled member of the Lumbee Tribe of North Carolina, the largest non-federally recognized tribe in the country. This statement reflects the views of the Miami Nation of Indiana as well as my own.

Non-federally recognized Indian tribes -- the issue

Indian tribes that lack federal recognition are missing only federal acknowledgment of their status as native governments -- they are, in fact, native governments. Powers of self-government held by native governments do not derive from the United States, but from the will of their own people. Thus, non-federally recognized tribes can and do exist as self-governing peoples. The Congress documented the existence and identity of most non-federally recognized tribes in the Task Force Ten Report of the 1977 American Indian Policy Review Commission. In other words, the absence of federal recognition for Indian tribes is a failing on the part of the United States, not a failing on the part of non-federally recognized tribes.

Those tribes that are recognized became such usually as an accident of history. In most cases, tribes acquired the status of federally recognized as a secondary incident to some formal dealings with the United States, i.e., a treaty or statute

addressing a particular federal concern with that tribe. And the United States did not seek these tribes out for the purpose of bestowing federal recognition. The United States usually sought these tribes out because the United States wanted something from them, typically peaceful relations and their land. If the United States had no cause to deal formally with a tribe (usually because a tribe was pacified or deprived of its land or other resources early in its relations with the dominant society), that tribe never obtained federal recognition of its status as a native government.

While the absence of federal recognition is generally not purposeful, the impact of non-recognition is dramatic. Tribes' practical ability to preserve and protect their separate culture and way of life, free from interference of state or other authority, is very difficult without federal recognition of the tribes' self-governing authority. As a result, non-federally recognized tribes have for generations sought federal recognition through various means, typically a special act of Congress or administrative action.

Despite the importance of the issue to the affected Indian communities, the Congress has never adopted a tribal recognition policy or a statute establishing a process by which tribes can acquire federal recognition. Congress considered such bills upon the recommendation of the American Indian Policy Review Commission. However, the Department of the Interior at the time urged restraint and assured Congress that it intended to address the issue by regulation. The Department did so for the first time with the adoption of the federal acknowledgment regulations in 1978.

The federal acknowledgment regulations

In its 1978 regulations, the Department attempted to standardize what had been up to that point an ad hoc process. As summarized in the classic federal Indian law treatise, the Department had used a number loosely defined, alternative criteria to determine tribal existence. See F. Cohen, Handbook of Federal Indian Law, p. 271 (1942). In its 1978 regulations, the Department created an office and a process to formally review these criteria, made them all mandatory, and required that each be proved continuously from the time of white contact to the present. 43 Fed. Reg. 39361 (Sept. 5, 1978), presently found at 25 C.F.R. Part 83.

The review process established for petitions for federal recognition was a closed one. It provided for an initial review for obvious deficiencies in the petition, a substantive review resulting in a proposed finding, and a further review of comments on the proposed finding resulting in a final determination. Except for the initial review for obvious deficiencies, the Department's work takes place behind closed doors, with the petitioner not knowing the result until the proposed and final determinations are announced to the public. Even worse, the process has no firm deadlines that assure petitioners that there will be a decision on a given petition by a date certain. Fully documented petitions typically languish for years before the Department begins active consideration. Once active consideration does begin, the petitioner again typically waits years for the final determination.

In 1994, the Department revised the acknowledgment regulations. It made three sets of substantive changes. First, it added a separate provision for previously acknowledged tribes that reduces the documentary burdens for those tribes. Second, it shortened the time period for the criterion requiring tribes demonstrate continuous identification as an Indian entity; now, tribes must show such since 1900, rather than since sustained white contact. Third, it added a lists of facts or circumstances by which the petitioner can demonstrate two of the criteria -- i.e., community and political authority; the additional circumstances are generally quantifiable facts in an effort to infuse some predictability into the process. However, the basic structure and thrust of the process and criteria are not altered.

There are serious procedural and substantive difficulties with the administrative acknowledgment process. These serious difficulties are well known to the Congress, having been the subject of multiple oversight hearings. With the exception of Administration witnesses, witnesses at these hearings have all testified that the present process is broken beyond repair. Congress has been urged for years to replace the administrative process with a new one. S.611, presently under consideration by the Committee, is such an effort.

The Commission - sections 4, 6 through 12, S.611

Procedurally, S.611 is a good start. With the creation of a commission and an adjudicatory process to rule on petitions for federal recognition, S.611 solves half the problem in the current administrative process -- that is, it requires an open decision-making process by a commission that lacks the institutional biases of the Bureau of Indian Affairs [BIA]. Because its mission is to serve federally recognized tribes, the BIA is institutionally incapable of fairly judging non-federally recognized Indian tribes, particularly through the closed decision-making process currently employed by the Bureau. The creation of an independent commission is an important step that gives non-federally recognized tribes at least the prospect of a fair assessment of their petitions.

Some fine-tuning of the procedural provisions of S.611 is in order. Mark Tilden, with the Native American Rights Fund, makes some helpful suggestions in that regard in his testimony. I will not repeat those proposals here, but do support the changes to the bill proposed by Mr. Tilden.

There is one procedural point that, because of its importance, does bear emphasis. The bill excludes certain groups from eligibility to petition the commission for recognition. Among these are groups that have previously submitted petitions and been denied or refused recognition under the regulations promulgated by the Secretary. S.611, §5(a)(C). This exclusion is unfair. As is discussed below, the present process is unduly burdensome and arbitrary. Tribes that have been subjected to this arbitrary process must be given an opportunity to establish their status in a fair and reasonable process. Otherwise, there will be created two classes of non-federally recognized tribes with unequal rights and opportunities, depending solely upon the time at which their

petition for recognition was processed. Because we can have no confidence in the objectivity of petitions processed before the commission is empowered and operating, petitions processed before that time must be submitted for reconsideration by the commission.

Difficulties with the criteria, section 5, S.611

Under section 5 of S.611, the newly created commission would apply the same criteria to the determination of tribal existence as those applied in the present administrative process.[1] As written and applied, the criteria in the present regulations are so burdensome and heavily dependent upon primary documentation and subjective determinations that many legitimate Indian tribes simply cannot meet them. If these same criteria are applied by the commission, the commission will become bogged down in expensive and time-consuming examination of minutia, much of which is unnecessary to the determination of tribal existence. Worst of all, the commission will fail to recognize legitimate Indian tribes, just as the BIA has done under the current regulations. To illustrate the poor fit between the present criteria and actual tribal existence, I'd like to highlight four provisions or aspects of the criteria for the Committee's consideration.

Extreme time depth

First, the concept of continuity since the time of sustained white contact, as applied to both political authority and community, is unnecessary and unworkable. The essential inquiry here is whether an Indian group holds and has exercised limited sovereignty. As noted above, this sovereignty does not derive from and need not be confirmed by Europeans. As a result, the time of white contact is irrelevant to the inquiry of tribal existence and an unnecessary burden to petitioning Indian groups.

When sustained white contact as a point of reference in time is combined with the requirement that political authority and community be documented continuously since that time, the requirement becomes unworkable. By definition, non-federally recognized tribes have not been the subject of extensive federal or state record-keeping. Typically, non-federally recognized tribes have no common resources (such as a land base) and received no programs that would generate records. Typically, non-federally recognized tribes did not generate historical records of their own. Discrimination and hostile policies often required that non-federally recognized tribes purposefully avoid record-keepers for their own protection. Because of this historical reality, the requirement of continuous proof since sustained white contact

[1] These is only one difference between the present regulatory criteria and those proposed in S.611. In the first criterion, or identification as Indian, the regulations require the petitioner to demonstrate identification as an Indian entity since 1900. 25 C.F.R. §83.7(a). However, S.611 would require such proof since 1871. Section 5(b)(1). In this respect, S.611 is even more burdensome that the existing regulatory process.

means that legitimate Indian tribes may fail to achieve federal recognition.

The community criterion

Second, and apart from the time depth problem, the community criterion requires proof of "consistent interactions and significant social relationships [exist] within its memberships and that its members are differentiated from and identified as distinct from nonmembers." 25 C.F.R. §83.1; S.611, §2(7). This can only be demonstrated through sophisticated field work and social science analysis -- an undertaking that is time consuming and expensive. The minutiae currently examined by the BIA to make this inquiry include members' telephone bills, attendance lists at members' funerals, and the like, to demonstrate the extent of contact among tribal members. The practical ability to undertake such detailed analyses is obviously affected by the size of the petitioning group. It is not surprising, for example, that the smaller groups have more often succeeded in demonstrating community while larger groups have not. Finally, this inquiry is not only highly detailed, but is also highly subjective. One researcher may see a community where another researcher does not because of the very nature of the inquiry.

In its 1994 revisions to the regulations, which revisions are also included in S.611, the Department attempted to establish definite markers for the community criterion to make it less subjective. It did not alter the community criterion or definition, but provided that certain indicia will automatically be taken as proof of community, such as 50% residence of tribal members within a geographic area, 50% in-marriage rate, etc. 25 C.F.R. §83.(b)(2); S.611, §5(b)(2)(C). As a practical matter, these clear markers can be met by very few non-federally recognized tribes. In fact, most federally recognized tribes could not establish them. For example, there are very few reservations occupied by recognized tribes where tribal members make up more than 50% of the population of the reservation or where more than 50% of the tribal members speak the language. Thus, these clear markers are only marginally helpful, still leaving most non-federally recognized tribes with the obligation to prove the extent and intensity on interaction among tribal members with data that, by its nature, is highly subjective.

The political authority criterion

Third, the political authority criterion, an interpreted by the BIA, has over time also become a highly subjective determination. The regulations (and S.611) appear to focus on structure and the existence of political leaders. However, the criterion requires

[2] As noted above, the term "bilateral political relations" does not appear in the BIA regulations. However, in a lawsuit challenging the BIA decision to recognize the San Juan Paiute Tribe, the BIA interpreted the term tribal member as requiring some affirmative indication of members' intent to maintain a meaningful political relationship

not only proof of political leaders but also proof of "bilateral political relations," i.e., that the members of tribe have a political relationship with the leaders of the tribe.[2] Presumably, this same requirement would be imported into S.611, even though not explicitly required, since S.611 lifts the political authority criterion straight out of the existing regulations.

This sophisticated concept of political authority, that is, one that reflects direct assent by tribal members through some mechanism, has little relation to political authority exercised by aboriginal communities. Political authority exercised in those communities is traditionally built on loose alliances of extended family groups, capable of acting in concert with each other as the occasion demanded. The more formal authority required by the regulations and S.611 may be in evidence on reservations with formal constitutions or other organic governing documents. But even there, it is unlikely that the tribe could demonstrate that a majority of its members have indicated assent through individual participation in their government. See 25 C.F.R. §83.7(c); S.611, §5(b)(3)(A).

The experience of the Miami Indians of Indiana bears witness to the difficulties with both the community and political authority criteria. The Tribe had been recognized by treaty with the United States in 1854 and was acknowledged as such by the Department of the Interior up until 1897. In that year, the Department of Justice opined that, because the Miamis in Indiana had been made citizens and all their tribal land had been allotted, they were no longer tribal Indians subject to the federal trust responsibility. Based on this opinion, the Department of the Interior administratively terminated the Tribe, withdrawing all federal protection for the Tribe and remaining allotted lands. With the loss of federal protection, the Indian Miami very soon lost all allotted land to tax foreclosure sales, resulting in a dispersion of tribal members. Even though the dispersion stabilized in areas surrounding the treaty allotted lands, the Department of the Interior concluded in 1992 that it would not acknowledge the Tribe because of weakened community and political ties. 57 Fed. Reg. 27312 (1992). The Department admitted that the present day members descend from the historically recognized Indiana Miami, that the contemporary Indiana Miami maintain at least minimal social and political ties, and that there is a continuous line of tribal leaders. However, the Department declined to recognize the Tribe under the regulations because of insufficient evidence of internal social ties or networks and bilateral political relations. This decision is currently under review in federal court in Indiana.

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with the tribal government. See Masayesva z. Zah, 792 F. Supp. 1178 (D.Ariz. 1992). This appears to assume a structure of some sort with a mechanism by which members may express their assent, through voting otherwise, to representation by the political leadership. This model of political authority simply does not correspond to the political authority of non-federally recognized Indian communities.

Genealogical connection with historic tribe

A fourth example of unreasonableness in the criteria is the requirement that modern day members prove descent from members of the historic tribe. This same requirement has been in the regulations since 1978 and has come in practice to require a near impossibility. It is not enough to show descent from family names historically associated with the tribe. Members must show a genealogical connection with a member of the historic tribe. It is very rare that such complete documentation exists for Indian tribes at the time of sustained white contact. In fact, such data does not exist for many federally recognized tribes. For example, sustained white contact for plains tribes goes back at least to the time of the Louisiana Purchase. Most of these tribes have at least partial census lists of tribal members, prepared for treaty annuity payment or similar federal purposes. However, because no local governments were routinely recording births and marriages at the time, modern day members of those tribes cannot prove ancestry from an individual member listed on those early census records. It is unreasonable to require non-federally recognized tribes to prove a fact that many federally recognized tribes cannot prove.

It should also be noted that there is a considerable degree of discretion involved in this criterion as well. In some cases, the BIA has been willing to accept something less than direct genealogical evidence of descent from a historic tribe, such as, for example, statement of such connection from established ethno-historians or other experts. However, the BIA does not always accept the reliability of such evidence. Most recently, in the case of the Houma, the BIA declined to accept the word of John Swanton, a well respected expert on Indian communities, that the present day Houma descend from the historic Houma Tribe. For that and other reasons, the BIA has proposed to decline acknowledgment of the Houmas.

For these reasons among others, I urge the Committee to reconsider the criteria set out in S.611, §5. The BIA's experience in administering the current regulations shows that these criteria are overly burdensome and subjective. By writing those criteria into law, S.611 would lock the Commission into using unworkable criteria, with the inevitable result that the Commission would also fail to bring fairness and reasonableness to the acknowledgment process.

An alternative to S.611, §4

Over the last three years and in response to concern expressed in the Senate and House of Representatives, lawyers and others representing non-federally recognized tribes have discussed informally with the Department of the Interior how the criteria might be changed to more fairly and accurately reflect the historical experience of non-federally recognized tribes. The substance of these informal discussions is reflected in H.R.361, presently pending in the House of Representatives. Mr. Faleomavaega, the original sponsor of H.R.361, has shown the same commitment to fairness for non-federally recognized Indian communities as shown by the leadership of

this Committee..

Like S.611, H.R.361 proposes the creation of a commission to process petitions for federal recognition through use of an open, adjudicatory proceeding. In response to concern of the Department of the Interior, though, H.R.361 would not create an independent commission, but one that is part of the Department of the Interior. Other than this difference, the commission created in H.R.361 would process petitions very similarly to the commission proposed in S.611.

Unlike S.611, H.R.361 would not simply write the present regulatory criteria into law. H.R.361 basically adopts the same structure as the regulations and S.611 (with seven mandatory criteria). However, H.R.361 modifies those criteria in ways that reduce the unnecessary detailed and burdensome inquiry and reduces the subjectivity, and hence arbitrariness, of the criteria. The major changes in the criteria include the following:

First, H.R.361 shortens the time span for which continuous existence must be proved. Rather than beginning with first sustained white contact, H.R.361 begins with 1934. As suggested above, there is no legally required date for this inquiry. It only need be of sufficient length to assure the decision-maker that the current Indian community is not reconstituted or of recent origin. 1934 is a reasonable date for this purpose, since there were no economic or other particular incentives for an Indian community to hold itself out as such at that time. In addition, 1934 brought in the federal policy of support for tribal communities, a policy that has failed as to non-federally recognized tribes. It seems fair and fitting that if an Indian community was in existence at that time and has continued its existence since, it should be presumed to be a historic Indian community. Finally, it is important to note that proof from this date gives rise to a presumption of historic existence, so that the petitioner need not prove existence before that date. If the Department or other interested party may demonstrate that the petitioner did not exist before that date; in this case, the petitioner is not entitled to recognition

Second, less subjective indicia of political authority and community are included in the criteria, such as long-standing state or local government recognition of a continuous line of group leaders. These indicia allow for recognition of a group without making the detailed and subjective inquiry presently required into the extent and nature of interpersonal relationships among tribal members.

Third, data other than direct genealogical connection is deemed acceptable proof of descent from a historical tribe. These include reports, research and other statements based upon first hand experience of historians and anthropologists as well as genealogists.

Conclusion

Non-federally recognized Indian communities have waited for even-handed and

fair treatment from the United States for more than two hundred years now. There was the promise of such in 1978 in the form of the Department of the Interior's regulations. However, this promise was an illusion. Instead of even-handed and fair treatment, the regulations established a closed process with burdensome criteria that bear little relationship to the actual experience or reality of non-federally recognized tribes. Worst of all, the regulatory process has resulted in the denial of recognition to clearly worthy Indian tribes, such as the Miami Indians of Indiana. At this point, only Congress can solve the problem. S.611 is a step in that direction. With appropriate changes to the criteria and a reopening of the process to tribes that had been subjected to the arbitrary and unfair administrative process, S.611 will finally bring a new beginning for non-federally recognized tribes.

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Honorable Ben Nighthorse Campbell
Chairman, Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C 20510-6450

June 15, 2000

Dear Senator Campbell:

Thank you for the opportunity to testify on S.611 on May 24, 2000. Non-federally recognized tribes appreciate greatly your efforts to reform the federal acknowledgment process and look forward to the passage of effective legislation in that regard.

In response to your letter of May 25, I offer the following observations:

1. I do not believe that all 150 pending petitions for federal acknowledgment are meritorious. However, I do believe that there is a large number of legitimate Indian tribes that are not formally recognized as such by the United States. The Congress identified 133 non-federally recognized Indian communities in 1977, well before the enactment of the Indian Gaming Regulatory Act in 1988 and other financial inducements to the assertion of tribal status. See Final Report, American Indian Policy Review Commission, Task Force X, Vol. 1, p. 467. This 1977 list was compiled from a variety of sources, all of which gave some indication of the legitimacy of the groups listed. Interestingly, some of those groups have since been denied federal acknowledgment through the present administrative process.

2. Political motivation is a legitimate concern in the processing of petitions for federal recognition. Indeed, one of the concerns about the present administrative process is that it is opague, that is, it takes place behind closed doors, creating the opportunity for inappropriate political influence. For this reason, I strongly support your proposal to create a new office outside the Bureau of Indian Affairs to process petitions for federal acknowledgment.

Of course, the creation of an independent commission run by political appointees also raises the spectre of political influence in the process. In my view, political influence of the process can be best minimized through a commission that is independent of the Bureau of Indian Affairs and staffed by commissioners with appropriate professional credentials, rather than political appointees. Hopefully, a professional commission would also avoid the delay inevitable in the process of nominating and confirming political appointees.

3. It is my view that Indians groups that have been denied acknowledgment through the current administrative process should be reconsidered by the newly created commission. The present process has proved to be so arbitrary that the Congress cannot be assured that all groups have been fairly treated. It is particularly appropriate that groups with admitted Indian identity (criterion e), that were denied acknowledgment based upon a subjective, qualitative

evaluation of its community or political process. See point 4 below.

Neither would allowing reconsideration of such groups by the commission create a log jam in the commission at the outset. By my estimation, there are less than ten petitioners who were acknowledged to be Indian, but were denied based upon other criteria. The final determination against acknowledgment of these few groups could be treated under S.611 as a notice of negative determination. See S.611, §8(b). As a result, these petitions would move immediately to an adjudicatory hearing. Id., §9. Since the newly formed commission will not yet have any petitioners at that stage of the process, reconsideration of these petitioners would not cause any delay in the commission's deliberations generally.

4. S.611 uses the same criteria as the current administrative process. I do not advocate a change in the basic criteria; however, I strongly believe that experience with the criteria proves that some change in acceptable forms of evidence on those criteria is necessary. The best examples of this are the community and political authority criteria. In the case of community, the BIA requires proof of significant interaction on a personal level among tribal members. This kind of data are highly intrusive (in one case, personal telephone bills of tribal members were examined by the BIA), subject to differing interpretation by different researchers, and difficult to compile (particularly for large tribes where large numbers of relationships must be established.) In the case of political authority, the BIA requires proof of the quality of the relationship between the tribal leaders and tribal membership, referred to by the BIA as "bilateral political relations," another highly subjective difficult matter to prove.

Tribes have been turned down in the existing administrative process because of an inability to prove this qualities. The Miami Indians of Indians, for example, a group admitted by the BIA to descend genealogically from the once federally recognized Miami Indians, was denied because of insufficient proof of interaction among a significant number of tribal members and insufficient proof of bilateral political relations. This tribe has approximately 4,500 members. Proof of these relationships with such a large group is almost impossible. Yet, the Miami Indians have long been considered a legitimate Indian tribe by outside observers and appear on the 1977 list of non-federally recognized communities.

To fix the acknowledgment process, different forms of evidence must be accepted to prove the criteria. And if Congress provides, as I strongly believe it should, that other, more objective forms of proof are acceptable to prove the criteria, then previously denied groups should be given another opportunity to do so.

I look forward to working with you and your staff on this important issue.

Sincerely,

Arlinda F. Locklear

TESTIMONY ON S. 611 OF CONNECTICUT LOCAL GOVERNMENTS ON TRIBAL ACKNOWLEDGMENT POLICY

Dear Chairman Campbell, Mr. Inouye and members of the Committee, this testimony is submitted on behalf of local governments in Connecticut (the "Towns") that have been, are, or may be, affected by federal tribal acknowledgment policy.[1] We come before the Committee in a unified manner to express our strong and common concerns with respect to S. 611, the proposed "Indian Federal Recognition Administrative Procedures Act."

As discussed in greater detail in the following testimony, we consider this legislation to be flawed and to present the risk of forcing tribal acknowledgment policy in a direction that will result in increasing conflict between petitioning groups and local governments. We strongly encourage you to withdraw this legislation from further consideration. Instead, the Committee should undertake a more detailed and open review of the current recognition process. This effort should include soliciting the views of affected state and local governments, citizen groups, recognized tribes, insurers of land titles, and BIA officials (past and present) at the staff level who can offer viewpoints not filtered through the policy level. Through this review, the Committee should seek to obtain meaningful, balanced, and realistic appraisals of the existing tribal recognition program. Until this comprehensive analysis is undertaken, it is premature to consider this legislation. In addition, while the entire acknowledgment process is under review, Congress should declare a moratorium on further review of petitions by BIA. The process is so seriously flawed that it would be unwise to allow BIA to continue to issue decisions.

Tribal Acknowledgments in Connecticut

Local governments in Connecticut have been forced to experience first hand the consequences of tribal acknowledgment decisions that are based upon an insufficient consideration of the facts and an unjustifiable predilection to accord tribal status to petitioning groups.

This pattern is evident with respect to the various offshoots of the historical Pequot Tribe. In 1983, Congress recognized the Mashantucket Pequot Tribe without any review of the facts. It now appears that the Tribe does not qualify on either

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[1] This testimony is submitted on behalf of the Towns of Ledyard, North Stonington, and Preston.

genealogical or community/political authority grounds, or, at the very least, this is questionable. Even though the Tribe very well may not exist, it has been allowed to reap a bonanza in gaming revenues from the world's largest casino located on a reservation that is three times larger than its original land claim and may have been improperly drawn without full knowledge by Congress. The host communities for this Tribe – Ledyard, North Stonington, and Preston – have been forced to live with the many negative consequences of this Tribe and casino, including a drastic deterioration in quality of life, increased crime, traffic congestion, adverse environmental and land use impacts, and the need to provide greatly increased government services without being able to collect taxes on Tribal property.

The Mashantucket Pequot experience underscores the permanent need for a completely impartial, professional and thorough investigation before granting federal tribal recognition.

In addition, BIA has issued proposed findings to acknowledge two more tribes in the same area – Eastern Pequot and Paucatuck Eastern Pequot. It has done so through what appears to be a politically-motivated process where policy level officials have overruled the expert opinion and recommendations of the Branch of Acknowledgment and Research ("BAR"). Our concerns about politically-motivated decisionmaking are discussed in Attachment 1 to this testimony. Our many problems with the BIA acknowledgment process for these petitions are discussed in Attachment 2. Our overall concerns with federal Indian policy in Connecticut as expressed to our state delegation are set forth in Attachment 3.

Similar problems are occurring elsewhere in Connecticut. The Golden Hill Paugussett petitioner, once properly rejected has, revived its claim through questionable decisions by BIA. The possible role of political interference is involved for this petitioner, as evidenced by the fact that the BIA managed somehow to overrule two prior decisions of that agency, and to disregard two prior opinions of the Department's own Solicitor's Office as to the propriety of the previous finding. The Towns of Colchester, Shelton, Orange and others are affected by this claim. The Schagitcoke petitioner in Kent also is seeking acknowledgment, as are 5 other groups in addition to the Eastern and Paucatuck Eastern Pequots, and the Golden Hill Paugussetts. This multiplicity of petitioners, many of whom derive from essentially the same historical tribe, create the prospect of a massive and unjustified change in the political, social, economic and environmental landscape of Connecticut.

Impacts On Local Governments

Before addressing specific concerns with S. 611, we will discuss how tribal acknowledgment affects our interests. Local governments are impacted by tribal acknowledgment reviews and decisions in a number of very important ways. Because the recognition of a new tribe has such serious consequences for a local government and the residents it represents, the mere pendency of petitions for acknowledgment creates considerable controversy and concern. In some cases, including several in Connecticut, even before a tribe is acknowledged, the petitioning group files land claims litigation. If such challenges to the title of land ownership of residents in an affected community are not filed prior to recognition, they very often either follow or are threatened to follow acknowledgment. Needless to say, such litigation causes serious disruption to the lives of the affected landowners and the economy of the local community.

In addition to disputes over land title, the acknowledgment of new Indian tribes often gives rise to the effort to establish new gaming facilities. Indeed, it will be of no surprise to the Committee that many of the tribal recognition petitions which members of these towns are confronting are closely associated with anticipated gaming developments and financed by wealthy non-Indian developers and gaming companies. The Indian Gaming Regulatory Act has created huge incentive for petitioning groups, as supported by their financial backers, to seek recognition. If they are successful, the newly recognized tribes are then in a position to reap the significant benefits that flow from gaming on tribal lands. Such gaming is often opposed by the communities in which the casinos are located. In other circumstances, even if gaming is not opposed in principle, the facilities developed by tribes on Indian land are subject to special privileges, such as tax exemption and exclusion from land use requirements, which are not accorded to other landowners and businesses. The result is an imbalance of economic opportunity that strongly favors Indian gaming enterprises and related businesses. Indeed, this imbalance between tribal and nontribal commercial undertakings occurs even in the absence of gaming. The resulting favorable treatment of the recognized tribe, whatever its origin, is a source of considerable conflict between Indian and non-Indian communities. And that preferential treatment cannot be justified under any political, social, moral or historical principle.

New tribes almost always seek to obtain reservation or trust land. Land placed in this status becomes exempt from state and local taxation, land use controls, zoning requirements, and environmental and other restrictions. In many cases, our governmental burdens are increased as a result of the development of gaming facilities and trust lands, and yet we are deprived of the revenues that would normally be associated with the tax revenue generated by such facilities. In addition, carefully

planned land use programs within our communities can be disrupted, if not destroyed, when land is taken into trust, and tribes proceed to undertake whatever kind of development suits their interests. The end result, in many cases, is a seriously strained and conflictual relationship between newly recognized tribes and local governments and the residents of surrounding non-Indian communities. This conflict is an end result to be avoided whenever possible.

As the Department of the Interior itself has stated, recognition has "serious significance" and "considerable social, political, and economic implications for the petitioning group, its neighbors, and federal, state and local governments." Letter from William B. Bettenberg, Acting Assistant Secretary of the Interior, to the President of the United States Senate (Jan 17, 1992).

All of these factors lead to one clear conclusion: Tribal acknowledgment should not be accorded under anything other than the most rigorous, searching objective, professional and equitable standards, both procedural and substantive. One of our major concerns with S. 611 is that it would result in such a serious relaxation of the standards for recognition that many unqualified and undeserving petitioning groups would be likely to achieve acknowledgment, resulting in adverse effects on our communities. In other words, the proposed "fix" would make the process, and the likely results, even worse.

Response to Arguments in Favor of S. 611

Before addressing our specific concerns with this bill, we wish to address some of the arguments that have been advanced by supporters of S. 611. In general, we consider the arguments advanced in favor of the bill to be incorrect and insufficient grounds for such a radical departure from existing recognition procedures.

It is argued that BIA's budget limitations have created bias against recognizing new tribes. While this may be an attractive statement to make, we have seen no evidence that it is in fact the case. We are aware of no negative recognition decisions in recent years that were not justified by the merits. In fact, we believe that there have been questionable decisions that have gone in favor of petitioners. Clearly, this is the case with the recent proposed findings for the Eastern Pequot and Paucatuck Eastern Pequot petitioners as well as the decision to renew the consideration of the previously rejected Golden Hill Paugussett petition. Obviously, the solution to this problem – even if it is legitimate – is not to change the standards so as to open the floodgates to acknowledgment, but to address instead whatever budget shortfalls BIA might have so that it can do an adequate job processing the requests.

Concern has also been raised over the expense of the acknowledgment process for its participants. Certainly, we agree with this criticism. Those among us who have participated in the acknowledgment process have had to bear these expenses. Although these costs have seriously strained our resources, the critical importance of acknowledgment decisions makes it inevitable that a high level of scrutiny must be placed upon the evidence submitted. This requires the use of experts, consultants, and attorneys, and this costs money. Unfortunately, this is an inevitable consequence of a system that bestows tribal status on a previously unrecognized group of individuals. In any event, we see nothing in S. 611 that would significantly reduce costs of the process. Although this bill would relax some of the standards for recognition and create a procedural forum for review that is generally more favorable to petitioners, the costs will still be substantial.

It is important to recognize that federal funding is already available under present law to finance research by petitioners. It also appears that financial and legal backing has been provided, directly or indirectly, by the gambling interests who would benefit from casino operations that would be available for a federally recognized tribe.

It is argued that the BIA recognition process takes too long. This is true. Once again, however, S. 611 would not significantly reduce the time involved. To the extent time constraints are set by S. 611, they are unrealistic and will be regularly exceeded. Merely getting the new process up and running will be very time-consuming. We are concerned that in recent years there has been somewhat of an effort to put the BAR in the position of having a "no-win" task. It has a small staff which must handle extremely complex issues. Neither BIA nor Congress has been forthcoming in providing additional resources to this office. A self-fulfilling prophecy has thus been established in which the review of pending petitions necessarily goes slowly and painfully forward. And even when it does reach a decision stage, opportunities for political interference threaten to undermine the credibility of the end result.

Proponents of S. 611 argue that the current tribal recognition process does not accord "due process" to petitioners. However, the present acknowledgment procedures provide petitioners with every right that can be reasonably be expected under the circumstances and a full and fair opportunity to make their case. The opportunities extended to petitioners include:

1. The right to submit arguments and evidence in the form of a documented petition. See 25 C.F.R. § 83.10(a); see also id. § 83.6(a) and (c).

2. The right to a technical assistance review by the agency to provide the petitioner with an opportunity to supplement or revise the documented petition prior to active consideration and to submit additional information and/or clarification. Id. § 83.10(b)(1) and (2).

3. The right to submit arguments and evidence to rebut or support the proposed finding. Id. § 83.10(j)(1)).

4. The right to technical advice by the agency concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding. The petitioner also has a right to the records used for the proposed finding not already held by it, to the extent allowed by federal law. Id. § 83.10(i).

5. The right to a formal meeting with the agency, if requested by the petitioner, to inquire into the reasoning, analyses, and factual bases for the proposed finding. The proceedings of the meeting shall be on the record. Id. § 83.10(j)(2).

6. The right to respond to comments by any interested or informed parties during the response period after the proposed finding. Id. § 83.10(k).

7. The right to seek reconsideration of the final determination before the Interior Board of Indian Appeals based on the grounds provided for in the regulations through a process of independent review. Id. § 83.11.

A key point is that, under this system, adequate reciprocal opportunities for other interested parties are not provided in some instances. While some of these rights also apply to interested parties in addition to petitioners, we have found that in actual practice petitioners have more advantages under the present process than do state and local governments. This general observation has been borne out by our experience with the Pequot petitions, where our rights have been fundamentally violated as described in the attachments to this testimony. Needless to say, this lack of balance calls into question the legitimacy of the acknowledgment process itself.

Furthermore, state and local governments would be even more disadvantaged by S. 611, which gives them virtually no guaranteed rights of participation. The existing acknowledgment process has multiple layers of procedural review built into it. We disagree with the proposition that, when the existing acknowledgment process has been fully exhausted, petitioners are not given a fair opportunity to make their case and refute arguments presented against them. Due process does not in all cases require the opportunity for cross-examination of witnesses or adjudicatory

proceedings. This is an added procedural opportunity that may, at the margins, provide some value. We question, however, whether it is needed to any significant degree. Acknowledgment determination under present law depends largely on primary, documentary evidence based to a considerable extent on original records that can be verified by the agency and which should be available to all parties, without the need for formal hearings.

Finally, although the concept of this bill has been around for many years, we must emphasize one obvious point. Throughout the prior consideration of this issue before Congress, we are aware of virtually no effort to reach out to affected parties other than petitioning groups and BIA to solicit views and input. This hearing on S. 611 is an example of the one-sidedness of the legislative process, as no state or local government entities were asked to testify. This is a serious flaw in the legislative process that has been used to construct this bill to date. To the extent this Committee desires to develop balanced and objective legislation, it needs to reach out to other affected parties to solicit their input and incorporate it into the message to be delivered. Many of us have participated in a constructive manner in tribal acknowledgment petitions and have experience that can be brought to bear. Our views and opinions should not be overlooked.

General Comments on Preferred Approach for Federal Legislation

The Towns support an effort to bring serious reform to the tribal acknowledgment process. To achieve real reform, four general themes should be addressed.

First, as noted in the attached letter to Secretary Babbitt, we believe that BIA does not currently have legal authority to acknowledge Indian tribes under federal law. Congress has never delegated this authority to the Executive Branch. Equally important, Congress has never established meaningful guidelines to control the manner in which BIA makes acknowledgment decisions. These deficiencies are clear violations of fundamental Constitutional principles. Given the importance of acknowledgment decisions, BIA should not be left to make such determinations without detailed Congressional guidance.

Second, should Congress enact legislation conferring such authority and setting standards, it must do so in a manner that sets a rigorous standard for acknowledgment. The current BIA standards are too permissive, as are the criteria in S. 611. A petitioner should be required to meet a heavy burden of proof under rigorous, detailed criteria. In short, Congress should dictate that acknowledgment should not be

available to petitioning groups except in those cases where the highest standards of proof can be met.[2]

Third, such decisions should be arrived at through a procedure that is fair to both petitioners and interested parties. Such balance does not exist under the 25 C.F.R. Part 83 regulation. Nor would it be provided under S. 611. A new approach is required.

Finally, we believe that the Commission approach that is proposed in S. 611 is flawed and should not be adopted. It does not remove the potential for politicization of the decision, nor does it eliminate the potential for bias in favor of petitioner. In addition, the time frames are very unrealistic and insufficient opportunity is provided for participation by interested parties.

We believe that the Committee should reject the proposal for an Indian Recognition Commission, in favor of an approach that will be both objective and fair. Instead of the proposed Commission, we favor use of an administrative law judge adjudicatory process. Under our proposal, an administrative law judge, or panel of judges, should be tasked with conducting fact-finding proceedings under the relevant criteria. BIA can participate and submit its views and analysis, as can the petitioner and interested parties. The judges can make findings of fact based on all of the evidence, which would then be referred to the Secretary, not the Assistant Secretary, for final action. The Secretary's decision should itself be subject to review by the Interior Board of Indian Appeals. Judicial review should be available at that point.

We request that all of these basic principles be reflected in any bill designed to reform the acknowledgement process.

COMMENTS ON S. 611 PROVISIONS

Rather than respond on a section-by-section basis, the Towns will comment on the general themes presented by S. 611.

Weakening of Criteria

S. 611 would clearly "lower the bar" for tribal recognition. The standards currently administered by BIA, although clearly not without their problems, generally

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[2] This testimony does not address our deep concerns over the unfair, inequitable and improper rights that are accorded as part of tribal status.

require a more rigorous test for acknowledgment. As we have explained, a careful and stringent test for acknowledgment is absolutely necessary given the significant consequences of recognition for the federal government, state and local governments, non-Indian residents of affected communities, currently recognized tribes, and petitioners. Three areas in which the criteria is weakened by S.611 are as follows:

S. 611 Does Not Create a Valid Test of Historical Continuity. One of our major objections to the criteria in S. 611 is that they would make it far too easy to provide historical proof of tribal continuity. The fundamental premise of federal acknowledgment is that the purported tribe has maintained its existence over time – genealogically, culturally, socially, and politically. This principle cannot be questioned. If the tribe cannot trace its roots to the early years of the settlement of what is now the United States, then no true "tribe" exists. To depart from this principle is to allow the significant rights and benefits of tribal status to be conferred on groups that lack the requisite characteristics of historical Indian tribes.

The requirement of tribal continuity follows from key court decisions. The key elements of tribes are based on the premise that "[b]efore the coming of the Europeans, the tribes were self-governing sovereign political communities." United States v. Wheeler, 435 U.S. 313, 322-23 (1978); Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408, 425 (1980). Because tribal leadership must be rooted in a "once sovereign Indian community," continuity of that leadership must be shown. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 583 (1st Cir. 1979). Tribal continuity is also required to ensure that the membership has not abandoned the tribe and that the tribe has not disappeared. Id. at 587. See also United States v. State of Washington, 641 F.2d 1368, 1373 (1st Cir. 1981) ("To warrant special treatment, tribes must survive as distinct communities."). The Supreme Court has emphasized that, among other things, "the tribal organization [must be] preserved intact." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985). Nor are the prerequisites of tribal continuity, together with the other criteria for tribal recognition, too difficult to meet in deserving cases. Of those petitions which have been decided by the Department, fifteen (15) have been granted acknowledgment, while fifteen (15) have been declined acknowledgment, according to the BIA's April 4, 2000 status report. Thus almost 50% of acknowledgment petitions have succeeded before the BIA, which indicates that the agency has no predisposition to decline such requests. Indeed, we are concerned that such treatment often is too favorable to petitioners.

S. 611 Virtually Eliminates the Test for a Distinct Community and Political Authority. S. 611 would make it extraordinarily easy for these essential criteria to be satisfied. It would require that only one of numerous tests be met. Some of these tests

are so easy to satisfy that these criteria might as well be deemed irrelevant to the process. The weakest form of evidence cited in the bill, for example, "persistence of a named, collective Indian identity continuously over a period of 50 years, notwithstanding changes in name," (bill, § 5(b)(2)(B)(viii)), could very well suffice as proof of a distinct community, without the need to show additional evidence. Although a similar provision is contained in the present regulations, these regulations require that "some combination" of designated evidence, not simply just one factor, be demonstrated. See 25 C.F.R. § 83.7(b)(1).

Another problem is that sufficient evidence would be provided of community social institutions merely by evidence of institutions encompassing a "substantial portion" of members of the "group." (§ 5(b)(2)(c)(iv)). The existing BIA test is for "most of the members" to participate.

S. 611 Eliminates the Burden of Proof on Petitioners to Show Descent from an Historical Tribe. The bill dramatically departs from the accepted principle that the petitioner has the burden of proof. For example, under existing criteria the petitioner must prove descent from an historic tribe. S. 611, in section 5(b)(5)(B), would establish a presumption that this test is met upon proof that its members descend from an Indian "group". Thus, the bill abandons the requirement of tribal descent for the much less rigorous standard of an Indian group. Once again, this test would improperly ease the standards for acknowledgment and shift the burden to other parties to "disprove" the existence of a tribe. Such an approach turns the tribal recognition process on its head.

Lack of Clarity on Key Points

Certain essential aspects of current recognition standards and procedures are not readily apparent in S. 611. Thus, it could be argued by petitioning groups that these concepts do not exist. These include:

1. The need to satisfy all of the criteria. This may be the intent of S. 611, but it is not clearly stated.

2. It is unclear exactly what the term "Euro-Americans" means for the purpose of measuring historical tribal existence from first sustained contact. S. 611 §§ 3(12) and (25). Present regulations are clearer and refer to first sustained contact with non-Indians. 25 C.F.R. § 83.1 (definitions of historical and sustained contact).

3. The bill does not clarify that the criteria are "mandatory." Instead, it merely provides that a petition must contain "detailed, specific evidence concerning each" of the items listed.

The Commission on Indian Recognition

The proposal to establish a "Commission on Indian Recognition" ("CIR") has serious flaws. As a general rule, we favor insulating the review of recognition claims from the biases inherent in BIA. While petitioners claim these biases act against them, we believe that, to the extent they exist, the weigh in favor of petitioners. After all, BIA serves in a trust relationship to Indians and often plays an advocacy role on their behalf. We are especially concerned that, at the policy level, there may be an indication and desire to achieve the recognition of more tribes. Thus, if it were possible to truly establish an independent, objective review body that would analyze evidence from all parties fairly and equitably, we could support such a concept. But we do not believe such a body should take the form of an adjudicatory panel.

The CIR described in S. 611 would not fit this description:

1 Its members are to be appointed by the President, after considering recommendations from tribes, Indian groups, and persons with a background in Indian law, policy, anthropology, or history. Thus, the petitioning groups themselves, and their retained experts and counsel, would be given a strong say in who sits on the CIR.

2. Business can be conducted by only two members, eliminating any benefit from the requirement to have at least one member from another political party.

3. A Department of the Interior employee can serve, thereby weakening the independence of the Commission.

In addition to these problems, we believe the CIR would become hopelessly bogged down in its task. There is simply no way a three-member commission can fulfill the extensive evidentiary and decision-making burdens the bill would create, especially in the time frames allowed. Simply put, the bill is highly unrealistic in expecting the CIR to carry out these duties. In our opinion, creation of the CIR and transfer of the recognition process for all pending petitions, as well as those that might be reopened, will result in even bigger problems in efficiency, expense, and equity than exist under the current system.

Unfairness to Nonpetitioning Parties

S. 611 creates significant advantages for petitioners and does not give other interested parties, such as local governments, a fair opportunity to participate. These problems include the following:

1. Local governments do not receive notice of petitions.

2. Local governments are not specified as interested parties entitled to participate in the proceedings.

3. It is not provided that interested parties have a right to participate.

4. The preliminary hearing occurs 60 days after its submission. A petitioner can take years to prepare this case, but allowing only 60 days for other parties to review the evidence (if it even could be obtained) and prepare a response is wholly inadequate.

5. Records relied upon by the CIR must be provided to the petitioner, but not to other parties.

6. Other parties have no right to cross-examine witnesses, submit evidence, appeal a decision, obtain attorneys' fees, obtain advice from the CIR, or secure research grants from HHS. All of these rights are extended only to petitioners.

These are serious deficiencies that highlight the flaws in S. 611. Because S. 611 would provide such a serious imbalance in favor of petitioners, the procedure it envisions cannot serve as a reasonable approach to determining the validity of recognition claims.

CONCLUSION

For the reasons discussed in this testimony, our local governments oppose S. 611. This bill would significantly undermine the rights of non-Indian affected parties, resulting in an extremely complicated and costly recognition process, and make it far too easy for petitioners to achieve federal acknowledgment. While we do not endorse the existing recognition procedures, we see no basis for exacerbating the problems that currently exist. S. 611 would have that result, and we urge the Committee to decline further consideration of this bill.

Mashpee Wampanoag Indian Tribal Council Inc.
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June 9, 2000

TESTIMONY OF THE MASHPEE WAMPANOAG
INDIAN TRIBE OF MASSACHUSETTS
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
May 24, 2000

Mr. Chairman, Members of the Committee on Indian Affairs, My name is Vernon Lopez and I am the Chief of the Mashpee Wampanoag Indian Tribe of Massachusetts. While I am pleased to be able to submit testimony on S. 611, I must tell you, I am not a happy man. My Tribe has struggled relentlessly for over 400 years, since the first Pilgrims came to what is now called Massachusetts, to gain the recognition from the federal government that we so richly deserve. We still seek, and will someday achieve that recognition. It may be hard for Members of the Committee to comprehend that the Mashpee Wampanoags, descended directly from the Tribe that first met then saved the Pilgrims and with whom the Pilgrims celebrated the first Thanksgiving, have for centuries been denied the recognition and respect enjoyed by other Indian Tribes. These federally recognized Tribes have the dubious good fortune of having suffered their mistreatment at the hands of non-natives later in the history of the United States. Of the many injustices my people have suffered through the centuries including death by war, famine, European diseases, and the alienation of our Tribal lands and rights, it is this "chronological" injustice, of having been among the first tribes contacted by Europeans yet now forced to the back of the line for justice, that is perhaps the cruelest injustice of all.

Of course it would take hours for me to recount our complete history so before moving on to my brief comments on S. 611, I submit for the record a more detailed History of the Mashpee Wampanoag Tribe. Also included is a letter of resolution voted on by our board of directors.

As the Department of Interior's representative has testified, the Branch of Acknowledgement and Recognition (BAR) is virtually dysfunctional. It is before that

body that my Tribe's petition has been languishing for years despite the fact that we were recognized as a Tribe by the English Crown, the Massachusetts Colony and are now recognized by the State of Massachusetts. My Tribe agrees that BAR is in serious need of reform and realignment. We support any effort to make the process of making federal Tribal recognition determinations more efficient and would support the passage of S. 611 so long as a serious flaw in the bill as written is corrected. Section 5(2)(E) bars any Tribe that has had an adverse decision rendered by a United States Court from being eligible for federal recognition under the bill regardless of the circumstances of such adverse decision. This provision must be changed if my people are ever to achieve justice in this country. The Mashpee Wampanoag Tribe suffered an adverse U.S. Court decision back in 1978 in a proceeding in a United States Court to be submitted to a jury comprised of non-natives who would have been adversely impacted by a finding in favor of federal recognition for the Tribe. The decision predates the time when BAR was up and running. Our attorneys at this time asked the judge to delay the trial until such a time as BAR, which had just formed but was not yet operational, could review the formal petition my Tribe had submitted. Due in part to the long time that BAR required to finalize its procedures and regulations, the judge denied the delay and allowed a jury comprised of landowners whose interests would be jeopardized by a finding in favor of the Tribe, to decide the question. There was no surprise when such a jury found against the Mashpee Wampanoag Tribe.

Again, my Tribe lauds the efforts of the Committee and the sponsors of S.611 to reform the BAR process. We will support the passage of the bill so long as Section 5(2)(E) is deleted or changed to address our concerns. Perhaps the provision could be amended to apply to U.S. Court decisions that occur after the date of enactment of the bill. What we fervently believe is that a flawed jury trial in 1978 cannot and must not be the final deathblow to the over 400 year old hopes and dreams of my people. We look forward to working with the Members and staff of the Committee to work out acceptable changes to this provision.

Thank You,

Vernon N. Lopez

Vernon Lopez,
Mashpee Wampanoag Indian Tribal Council
Chief

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June 10, 2000

Tribal Resolution for Bar Process

WHEREAS: the Mashpee Wampanoag Tribal Council, Inc. ("Tribe") is the successor of the Mashpee Wampanoag Tribe of the Greater Wampanoag nation that has inhabited the Cape Cod area since time immemorial; and

WHEREAS; the Mashpee Wampanoag Tribal Council, Inc. has secured recognition of its Tribal government status from the Commonwealth of Massachusetts, but not yet from the united States of America; and

WHEREAS; the Lack of federal status deprives the Tribe and its members of access to important social services otherwise provided by the United States to Indian Tribes and their members; and

WHEREAS; the lack of federal status has hampered the Tribe and its members from preserving natural resources, reclaiming cultural patrimony and protecting and reclaiming its historic land base; and

WHEREAS; prior attempts to seek the assistance of federal courts to protect such natural resources and land base resulted in a preliminary finding that the Tribe could not establish its identity sufficiently to avail itself of the protections otherwise available under 25 U.S.C.&177 to void illegal transfer of tribal lands; and

WHEREAS; the Tribe has, for nearly two decades been actively pursuing an administrative determination by the branch of Acknowledgement and Research (BAR) within the United States Department of Interior acknowledging the continuous existence of the Mashpee Wampanoag Tribe: and

WHEREAS; the Tribe has, for more that four years, had its petition deemed "ready waiting for active consideration" by the BAR, no determination can be made, even in proposed form, until active consideration commences; and

WHEREAS; the Tribe is presently third on the list awaiting active consideration, a status that has not changed in more than two years: and

WHEREAS; the Assistant Secretary, Indian Affairs has recently testified that the bar process is an irremediable failure; without hope of recovery or acceleration, and he

therefore supports S. 611 transferring federal acknowledgement process to a new commission: and

WHEREAS; S. 611 provides, inter alia, for the transfer of all pending petitions (except those on active status) to a new commission, and that the new process shall not be available to any Tribe whose existence had previously been negatively determined in a judicial proceeding; and

WHEREAS; the prior negative determination in the Mashpee Land claim could bar the Tribe from full consideration in the new commission process, the Board finds that the tribe must seek certain amendments to protect the Tribe's interest in obtaining federal recognition through any process that may be created by S. 611 or any similar bill.

NOW, THEREFORE BE IT RESOLVED; that the Tribe submit testimony respectively requesting that S. 611 be amended to delete ss 5(a) 2(e), referring to prior judicial terminations as unfairly prejudicial to the Mashpee Wampanoag Tribe; and

FURTHER RESOLVED THAT THE TRIBE; submit testimony in favor of expediting the current process to provide relief for all the Tribes awaiting determination of their Acknowledgment Petitions.

SIGNED;

Glenn Marshall

Glenn Marshall, President
Mashpee Wampanoag Tribal Council

Vernon N. Lopez

Vernon "Silent Drum" Lopez, Chief
Mashpee Wampanoag Tribe

THE MASHPEE WAMPANOAG TRIBE OF MASSACHUSETTS

A Long and Proud Legacy

THE MASHPEE WAMPANOAG TRIBE OF MASSACHUSETTS

The Mashpee Tribe has been a victim for the past 400 years, a casualty of a political situation that has denied us the basic rights of other federally-recognized tribes. Over the years, we have witnessed our lands dwindle to almost nothing, our right to hunt and fish steadily encroached upon, and our people become poorer. Why is it that this country will spend millions of dollars on a small Cuban boy, but will not stop to "right a wrong" occurring in its own back yard?" We were the ones who provided the Pilgrims with food for the first Thanksgiving. Today, we have been all but forgotten. (Glenn Marshall, President, Mashpee Wampanoag Indian Tribal Council, Inc., June 2000)

Introduction

Their image has been indelibly etched in every American school child's mind and remembered year after year at Thanksgiving, but their name is rarely mentioned or remembered. It would surprise most people to find out that the Indian people called the Mashpee Wampanaogs -- the ones who aided the Pilgrims at the first Thanksgiving in 1621 did not vanish, as was the fate of a great many eastern tribes. In fact, the Mashpee Wampanaog people today are very much alive and thriving in the place where they have always lived -- in and around a small town on Cape Cod, Massachusetts, appropriately named "Mashpee."

The story of the Mashpee Wampanoag Tribe is a tragic and shameful example of the treatment of one of this country's oldest Indian tribes and a reflection of the continuing degradation suffered by scores of other native nations across the United States. The Mashpee story, inasmuch as it set the stage in the early 17th century for the subsequent mistreatment of tribes across

North America in the age of conquest by Europeans to these shores beginning in New England in 1602, continues to resonate as one of the greatest travesties this country has ever known, "a black eye on the Statue of Liberty," according to Mashpee Wampanoag Indian Tribal Council President Glenn Marshall.

All Americans know about the Indians who were present at this country's first Thanksgiving, celebrated with the newcomers, the Pilgrims, after the terrible winter of 1620-21. Other than referring to these native peoples as "Indians," can any of us identify them by name? It remains a sad fact that almost 400 years later most Americans do not know it was the Mashpee Wampanoag people--once known as the South Sea Indians and later as the "Praying Indians" --who nourished the Pilgrims, coming to their aid and supplying them with much of the food for the first Thanksgiving feast. What is perhaps more remarkable is that the great kindness and generosity shown by the Indian people toward the Pilgrims happened at all, considering that just a few years prior, in 1616-17, a terrible plague brought by the white settlers devastated the population of indigenous peoples in that region.

Do most Americans correctly identify some of the greatest Indian leaders of the past -- names like "Massasoit," "Squanto," and "King Phillip," as ancestors of the Mashpee Wampanoag people? The answer is no. Did we as school children ever learn the history of the Wampanoag Nation -- surely one of the largest native confederacies comprising 54 clans spread over a great portion of New England through present-day Massachusetts and Rhode Island -- undoubtedly once one of the most powerful, sophisticated and populous nations in all of North America? Again, the answer is no.

The fact that most Americans do not know the Mashpee Wampanoag story -- its long and proud history, its many contributions and sacrifices to this country in every war beginning with the Revolutionary War, and its ongoing fierce struggle to join the ranks of the United States' other federally

recognized Indian tribes -- is why it is such an important one to tell.

History of the Mashpee Wampanoag Tribe -- A Long and Proud Legacy

"We have always lived on this land and have always known who we are," Mashpee Tribal Chief and Elder Vernon Lopez says. Born, raised and having spent most of his 78 years on the Mashpee homelands (and coming home every weekend while he lived away), Lopez speaks of family lineages that go back centuries -- and even before -- European habitation of this part of New England.

Archaeological evidence of native habitation in this part of northeastern North America stems back from prehistory. According to archaeologists, some local village sites date back 5,000 years, indicating an unbroken continuum of habitation at Mashpee which continues in the 21st century. The Mashpee Tribe has what President Marshall says is a "rich tradition of being together and staying together."

At the time of the first European contact in 1602, the Mashpees, as well as other tribes of southern New England, had already well developed social, economic and political systems in place, and were initially welcoming to the first settlers of the region. All that the Indians of that region possessed -- prestige among neighboring tribes, wide-ranging lands and bountiful crops, effective systems of government, families and tradition -- was open to encroachment by greedy Europeans eager to exploit the riches of their new environment.

It could be said that the Mashpee Wampanoag Nation "went underground," in Chief Lopez's works, at various points in its history, which might be seen today as a survival tactic -- an important one which likely allowed major strands of the Mashpee culture to survive uninterrupted into the 21st century.

A studied acceptance of English ways in the years following that first

Thanksgiving in 1621, which included in most cases accepting a new religion -- Congregational Protestantism -- and/or allying with a new governing authority -- the King of England--, was well underway by the mid-17th century. In fact, the first Indian church in the colonies was established at Mashpee in 1666 (the building still stands in Mashpee today and is a symbol of the Mashpee peoples' long historical relationship with European settlers) and the Indian people there soon became widely known as the "Praying Indians." While a number of "Praying Indian" towns were established at this time, most eventually were disbanded in later years. The Mashpee "Praying Indian" town, however, survived due to strong Indian leadership working with an Englishman, Richard Bourne, who took it upon himself to dedicate his life to helping the Mashpee organize themselves into a "plantation," which would naturally evolve through the ensuing years into a full-fledged town, thus earning a place in the colony's General Court.

Mashpee, like other Indian towns, was thus organized because the inhabitants still spoke their native language, Wampanoag. Because the Bible and other texts were translated into the native language for teaching, Wampanoag as a written and spoken language persisted well into the later 18th century before it was overtaken primarily by English. People continued to live in traditional wigwam homes well into the late 18th century. Centuries later, Mashpee culture -- always strong -- is experiencing a renaissance: the art of basket making; the knowledge of medicinal plants and healing; language; leisure time games; hunting, fishing and shellfish gathering; mutual support among Tribal members within the community; and structured and strong social interactions and political influence.

By 1790, the Mashpee Wampanoag people had been subjugated and forced to adapt to the new white ways of life. Even as Christian converts, and now loyal to the English crown, the Mashpees were never granted the full rights of other non-native people, due in large part to the color or their skin.

It is ironic that 1790 was the year that the Indian Trade and Intercourse Act was enacted by the newly formed United States as a way of dealing with the nation's Indian tribes which were in existence long before the United States was formed. The Mashpees, as well as other east coast tribes which were not completely wiped out in the early days of European settlement, were not mentioned in this document because their transformation to something more acceptable to the prevailing ruling structure had been started more than a century before. The Mashpee Wampanoags never had a chance to exercise their status as a tribe.

In May 1833, in response to discontent in the Mashpee community caused by years of unpopular ministers and church rule, the Pequot Indian preacher William Apes helped the Mashpees draft a "Mashpee Declaration of Independence." This document declared that Mashpee "as a tribe" would rule themselves. Unfortunately, this attempt at self governance was substantially unsuccessful, raising a great uproar among the non-native community, although it did result in the Tribe's reassertion of control over the church and its minister.

The subsequent history of the Mashpee Wampanoag people living in and around the town of Mashpee proceeded apace along the same sad path of history that many other Indian people would travel, with efforts to assimilate the people into "civilized society" as time passed. The European attitudes toward work, advancement over your fellow man at any cost, the tireless quest for land, the acquisition of material wealth and political influence, slowly were accepted into some Indian peoples' sensibilities, as well.

However, despite the temptations of white culture and the centuries of white dominance, Mashpee people did what they needed to do in order to survive. Their firm conviction of who they are and their place on the land never died.

"The Mashpee Tribe has been a victim, but we are a tough victim

committed to the status and the rights that should have been ours from the beginning -- 400 years ago," Tribal President Glenn Marshall says.

The Mashpee Tribe Today

The Mashpee Tribe numbers approximately 1,700 members, with 75 percent of its members living in and around the town of Mashpee in Barnstable County, Massachusetts, as their ancestors have done since time immemorial.

The Mashpee Wampanoag Tribe is recognized by Massachusetts as an American Indian tribe. Its main land base consists of 55 tribally-leased acres in the town of Mashpee, which is located near the southwestern end of Cape Cod, Massachusetts. This is all that remains of the Tribe's 16,500 acres which were allotted by England's King George II in 1685 (and reaffirmed by Plymouth Colony), and an allotment of approximately 10,000 acres to individual Mashpees granted by an act of the General Court of Massachusetts in 1835. Lying adjacent to the 3,000-acre Mashpee Wildlife Refuge, the tribe's 55 acres remains sparsely populated and undeveloped today.

Government. The Mashpee people have a long and proud history of self government stemming back centuries and, indeed, of governing the town of Mashpee since its incorporation as a town in 1870. However, with the inevitable influx of non-natives into Mashpee, political control was eventually lost to a white majority by the early 1970s. Mashpee self government was, for the first time, incorporated separately from the town, but not from Mashpee land.

A Board of Directors is the Tribe's principal governing body and is comprised of 13 members whose terms are staggered to serve two-year terms. The Mashpees also have a Tribal Chief, who is selected through community concensus.

Tribal community facilities include water and a gas main serving some

parts of the community, a well and septic serving all 55 tribally-leased acres, and community electric needs provided by Common Wealth Electricity. The Mashpee Wampanoag Tribal Office is a main center of community activity, providing craft and cultural demonstrations, health classes and guest speakers.

Economy. Surrounded by wealthy communities on Cape Cod, many Mashpees struggle living with an economy that is highly dependent on tourist dollars and wealthy seasonal residents. A municipal airport and bus service are located 10 miles away from the town, making this a relatively isolated and rural area. Agriculture, construction, a fishery and the tribal government provide main sources of income for the Mashpee tribe and its people. An annual pow wow held over the fourth of July weekend reaps much needed income for the Tribe.

Family, Heritage and Culture. Family names distinguishing Mashpee tribal members can be traced back to the earliest days, with very large extended families comprised of the descendants of core families. "Sometimes the names have been changed slightly, but the family lineages remain," Chief Lopez says. Kinship ties among the Mashpee people remain very powerful today, with families gathering at regular intervals for reunions, pow wows and other activities that acknowledge and celebrate family and Mashpee culture.

The Mashpee people have pride in a heritage that goes back centuries. This pride is exemplified by such community buildings as the Old Indian Meeting House, which dates from the late seventeenth century. The building also has the distinction of being the oldest church on Cape Cod and the oldest Indian church in the United States. Preservation of this building, as well as the Parsonage building and other important places such as the traditional Mashpee burial grounds, are important expressions of the tribe's insistence upon the continuation of its material and spiritual culture and traditions.

The Struggle to Retain the Land. The Mashpee people have waged a centuries-long losing battle with their non-native neighbors over habitation and use of traditional Mashpee lands and natural resources, which were slowly and deliberately alienated from the Mashpee -- along with their political autonomy -- over centuries of non-native interference. Despite passage of an 1870 act that established the town of Mashpee and another act that granted citizenship to all male members of the tribe and permitted alienation of tribal land by ending limitations on the sale of Mashpee land to non-tribal members, the Mashpee continued to maintain a tribal identity that is inextricably tied to their centuries-old ties to their ancestral lands. Identification with place has continued from time immemorial. For the Mashpee Tribe, land is not viewed as a commodity, but as a common shared resource symbolizing a way of life, which includes for the Mashpee, hunting, fishing, farming and gathering of the abundant sea foods.

The Struggle for Federal Recognition -- "Righting a Wrong"

In the late 1970s, after a law suit filed by the Mashpee Tribe in an effort to reclaim their ancestral lands was dismissed because a jury found that the Mashpee were not a tribe as it related to the Federal Nonintercourse Act of 1790 and thus, had no legal right to challenge the alienation of their lands. Since that time, the Mashpee Tribe has not relinquished its fight to prove otherwise. In a process that began nearly two decades ago, the Tribe filed a petition with the U.S. Department of Interior, Bureau of Indian Affairs (BIA), for federal recognition. Today, still mired in a slow-moving and cumbersome bureaucratic process, the Mashpee Tribe's petition is still awaiting active status by the BIA's Branch of Acknowledgment and Recognition.

At a recent Congressional hearing called by the Senate Committee on Indian Affairs, the federal recognition process at the BIA was called into question and was widely recognized as deficient at best and unworkable at

worst. The Native American Rights Fund, on behalf of several east coast tribes including the Mashpee Tribe, summarized the Mashpee's and other tribes' current frustrations of being caught in the middle of a system has been known to cater at times more to political muscle and maneuvering than it does to consideration of tribes' requests on a first-come, first-served basis.

The Mashpee Wampanoag Indian Tribal Council, Inc., was formally established in 1974. Buoyed by the energy of a new Tribal Council President and Chief, the Mashpee Tribe has been revitalized and is gaining considerable momentum -- and, indeed, has been garnering outside support from such communities as the Quakers and others -- in a new push for federal recognition which will, as many see it, "right a great wrong." All of the reasons why the Tribe was denied status as a tribe in the late 1970s are in the process of being reexamined, with the Mashpees even more carefully documenting those parts of its history as a Tribe -- a self governing and culturally distinct group of Native people who have from time immemorial lived in and around Mashpee, Massachusetts -- well before the word "Tribe" even entered the American vocabulary as the government's way of referring to groups of Indians, at the end of the 18th century.

Conclusion

Today, the story of the Mashpee Wampanoag Tribe can be observed from the perspective of "what went wrong" in the early days of European settlement in this country and how a centuries-long legacy of mistreatment, land misappropriation, and erosion of a proud and continuous culture was actively sought. It is grossly unfair -- and morally reprehensible -- that the group of people who helped this country's first settlers would be denied the rights that have been granted to other groups of Indian peoples in this country.

It might appear that the Indian people of Mashpee too eagerly accepted

the seemingly superior ways of the white man, in their welcoming a new religion and vastly different methods of governing and philosophical outlook on life. What else could they do, considering the consequences of not conforming to the newly dominant white culture? On the one hand, the acceptance of certain aspects of European culture was the only way that the Mashpee people could survive in an era of devastating social and political change. Other tribes on the east coast were not so fortunate and faced total obliteration by European's plagues and wars. On the other hand, having faced the "convert and conquer" approach of European settlers well before any of the western tribes would encounter them in the next century, the Mashpees were never considered on an equal footing with those other tribes.

Mashpee people have always told different stories from the ones that have been relayed in the white man's history books about Indian converts to Christianity. In the early days of the Colony and continuing through the era of the Praying Indian towns, Indian conversions were not what they always appeared, the people say. It has been acknowledged that some conversions were not real and that the apparent Mashpee acceptance of Christianity -- keeping up appearances as good Indian Christians -- helped the Mashpee people keep to themselves, living secret lives as Indians in the midst of the dominant white culture. As Chief Lopez says, the people were forced to "go underground" just to survive and to continue living their lives as Mashpee Indian people.

Adaptation to the white man's ways was rarely possible for North America's Indian tribes, and the Mashpee were no exception. Beginning with those earliest contacts, the Mashpee and other Massachusetts tribes have endured ongoing and devastating disruptions in their traditional ways of life: declines in population due to disease and war which began as early as the 1610s; famine; the onslaught of missionary activities; and continual encroachments on their lands. However, despite the hardships of centuries,

the Mashpee people continue to survive as a tribal people, their families, history and method of self government intact despite years of adaptation to pressures from the non-native culture.

It is a sad twist of fate that the Mashpees were unjustly deprived of their federal status as an Indian tribe. However, despite the many disappointments over the years and the most recent one in the late 1970s to recover the land which had been theirs, the Mashpee people did not disappear. The tribe continues to demonstrate that it represents a strong and viable Indian community which is separate from other Indian communities in Massachusetts as well as non-Indian communities and that it maintains its own traditional values and social system.

(Addendum)

Mashpee Tribe "Good News"

Through the years and continuing today, the Mashpee Tribe has been involved in a number of activities that reflect upon its cohesiveness as a tribal people and self governing body, as well as an active and concerned participant in the local civic and social arena.

The Mashpee Tribal Council meets every other Thursday of the month to consider any number of issues that pertain to the successful and ongoing governance and well-being of the Tribe. Among some of the more recent successes experienced by the Tribe in recent months are:

* This past May, for the the first time since 1977, a Mashpee Tribal Member was elected to the post of Selectman of the town of Mashpee.

* The Mashpee Tribe was recently asked to donate a flag pole to a new Veterans Memorial Park, which will be located in downtown Mashpee.

* This summer, the Mashpee Tribe has invited Cyrus Peltier, grandson of the famous American Indian political prisoner Leonard Peltier, to visit Mashpee as a guest on a Tribally-sponsored fishing trip. The Tribe is sponsoring the entire trip.

* Exercising its authority as a government, on equal footing with other Indian tribal governments, the Mashpee Tribe continues to work collaboratively with Maryland's Piscataway Indian Nation and its Chief, Billy Tayac, among other tribes. One of the most significant collaborations with the Piscataway Nation includes cooperation with the League of Indigenous Nations.

* This year, Mashpee young people have been elevated to the top of their classes in sports and academia. One was recently selected "Student Athlete of the Year," in Mashpee, another -- a recent high school graduate -- will attend Colgate University this year on a full scholarship. The Mashpee Tribe is extremely proud of these young people, who honor the Tribe with their achievements.

* The Wampanoag language is experiencing a renaissance, largely due to the efforts of Jessie Little Doe Fermino, a Mashpee Tribal Member and recent MIT graduate, who has dedicated herself to studying the old Wampanoag written texts of centuries past and reconstructing the language. Through Fermino's painstaking study and also through her role as instructor, Mashpee Tribal Members are now relearning their language.

* This year, the Mashpee Tribe will once again commemorate Mashpee culture at its annual Pow Wow, held around the July 4th weekend. The Mashpee celebration, which draws hundreds of Mashpee Tribal Members and members of many other tribes nationally and indigenous peoples internationally, has been held in Mashpee since at least the 1920s.

Hearing on S. 611 - The Indian Federal Recognition Administrative Procedures Act of 1999 Before the Senate Committee on Indian Affairs, May 24, 2000

Statement Submitted by the Association on American Indian Affairs, Inc. On June 6, 2000

The Association on American Indian Affairs, Inc., has consulted with American Indian tribes throughout the United States over the last 78 years, supporting, among other things, their efforts in Federal recognition and status clarification matters. We thank you for the opportunity to submit testimony on S. 611 - "The Indian Federal Recognition Administrative Procedures Act of1999." The Board of the Association on American Indian Affairs, Inc., has directed Staff to prepare remarks for submission to the Committee regarding the extent to which the BAR process invades the privacy of members of unacknowledged tribes, whether the same problems might continue under S. 611, and whether some remedies might be available.

Privacy and Confidentiality Issues in The Federal Acknowledgment Process: an Overview

The Federal acknowledgment process is an arduous rite of passage for groups of American Indians seeking to clarify their status through the 1978 administrative process prescribed at 25 C. F. R. Section 83, as revised in 1994. These regulations require petitioners to produce narratives and provide supporting documents and exhibits detailing the full range of personal interactions among members of the petitioning communities of Indians, ranging from the most trivial and commonplace to the most sensitive and confidential.

The BAR's *Guide* for Federal acknowledgment petitioners regarding the Federal acknowledgment process (dating to 1997, and published on their web site) offers petitioners some direction regarding the form and content of documentation (including written or printed documents, graphic and photographic displays, tape-recorded or videotaped statements, and other exhibits) that BAR expects acknowledgment candidates to include in a petition. The Commission arising under S. 611 would require the submission of essentially the same kinds of voluminous submissions, including those of an even earlier vintage (to circa 1871 rather than to circa 1900) than the present BAR process requires. While the aim of S. 611 is to facilitate the process and speed up the clock on processing petitions, it will substantially increase the present research burden on petitioners, increase preparation costs and the time necessary to complete petition submissions, while continuing the systematic practice of invading the confidentiality and privacy of petitioners and their members.

While failure to comply timely with BAR's disclosure requirements can easily be fatal to a petitioner, the Department itself historically has been slow to respond to inquiries about BAR's own activities, "thinking" on various issues, or "technical assistance" to petitioners, such as the BAR's *Guide* to the process, which appeared over a year after the deadline for its publications set

under the 25 C. F. R. Section 83 regulations. BAR's *Guide* has not been particularly helpful to most petitioners. In prescribing guidance to petitioners at Section 16 (a) of S. 611, Congress offers some hope of more useful direction to petitioners in this adversarial process.

On February 7, 2000, Mr. Kevin Gover, Assistant Secretary--Indian Affairs authorized these new procedures [published at *Federal Register*: February 11, 2000 (Volume 65, Number 29), *Notices*, Page 7052-7053], primarily in hope of achieving the same goal to which S. 611 aspires: speeding up the processing of acknowledgment petitions. However, in his statement at the May 24 hearing on S. 611, Mr. Gover said, "I have reluctantly reached the conclusion that I will not be successful in reforming this program. The more contentious and nasty things become, the less we feel we are able to do it." It appears Mr. Gover has lost confidence in the ability of the BIA to achieve even the limited goal of speeding up the process. As for the matter of providing direction to petitioners on what they must submit to BAR, and the degree of protection for privacy-sensitive matters that BAR can and should afford petitioners and their constituents, the *Guide* offered nothing when it first appeared. There is an assurance in the BAR's *Guide* to the acknowledgment process posted on the web site of the Department of Interior - Bureau of Indian Affairs that the BAR will amend and supplement the *Guide* on the web site, as a kind of loose-leaf service. However, neither the February 11 procedures, nor any update to the *Guide* explaining the effect of those new procedures on the process, yet appears on the BIA's web site (last updated on March 26, 2000). The *Guide* offers petitioners little regarding their rights under the Privacy Act, but provides a short list of items that should be protected under the Act and the circumstances under which these materials might routinely be exposed in the course of litigation. The materials the Guide mentions among those protected under the Privacy Act include:

- Membership lists;
- Genealogical materials covering the last 72 years;
- Addresses;
- Phone numbers;
- Dates and places of birth, marriage and death;
- Social security numbers;
- Health and benefit records; and
- Military service records covering the last 72 years.

The Guide suggests, "When you prepare the exhibits, try to separate privacy materials from those that will be publicly available." The BAR only recently has offered that counsel to petitioners, and in any case, it often is difficult or impossible to segregate such privacy-sensitive materials entirely in the narrative record if they are integral to stating the case for recognition as clearly as the regulations require, and uncertainty remains regarding the risk of exposure, even if inadvertent, of such materials to curious unauthorized readers.

The evidentiary burden on petitioners under the S. 611 process would be at least as heavy as those under the present one, and would require even more disclosure of privacy-sensitive material. The BAR *Guide* advises petitioners on what they need "to show . . . a modern community and had a tribal community in the past," and suggest that petitioners "have their

petition researchers take a look at the provisions of 25 CFR 83.7(b)(2)," if they "have, or did . . . have at some past time:

- A geographical settlement where more than half [of the petitioner's] members lived. . . .
- Maintenance and use of the tribal language . . .
- More than half [of the petitioner's] members marrying each other . . . [Elliptical comments added.]"

To meet these tests, petitioners must support their claims with the following kinds of documentation protected under the Privacy Act:

- Membership lists;
- Genealogical materials covering the last 72 years;
- Addresses;
- Phone numbers;
- Dates and places of birth, marriage and death.

The alternative is to follow the standard requirements in 83.7(b)(1), but 83.7(b)(1) would require the same kinds of disclosures. The *Guide* answers the question, "What are some activities that show a group maintains tribal relations?" briefly:

> Positive answers to the following questions indicate that your group may maintain tribal relations.
> - Do we know each other for a long time and in different aspects?
> - Do we visit each other, including distant relatives?
> - Do we attend each other's funerals, weddings, graduation parties, etc.?
> - Do we argue with each other over issues that are important to the tribe?
> - Do we share information so that we know about each other's problems and triumphs? Do we quickly pass information from one person to another until the entire group is informed of important news?

Again, in order to answer most of these questions, petitioners almost certainly will have to provide details generally protected under the Privacy Act.

The BAR *Guide* reminds petitioners to "***Include records from the modern period,***" observing that "Many petitioners forget to document the period after World War II. Apparently, they assume that since they themselves remember what has been going on during the lifetimes of their oldest members, everyone else (specifically the BIA's researchers) must know it also." In order to explain changes in the distribution of tribal population and intra tribal interactions in the tribal range over the past century, including the last generation, it may be necessary to disclose privacy-sensitive health and benefit records; school records, Military service records covering the last 72 years in the body of the petition's analytic narrative and exhibits. S. 611 would place equal emphasis on meeting the autonomous political existence and community continuity criteria for the modern era. S. 611 promises to do better than the old process, at least with regard to accelerating the review of petitions drastically. However, a hasty process, effected without procedural safeguards to protect the modern-vintage privacy-sensitive materials of petitioners' constituents and interested parties alike, could be costly and inefficient, as well as inequitable, in the long run.

The 1994 amended version of the 25 C. F. R. 83 process somewhat decreased the petitioners' burden, in adopting a fixed date (1900) from which each petitioner must produce evidence of continuous existence as an autonomous political entity and community of Indians. The 1994 regulations also allowed BAR to determine whether a petitioner meets certain "high evidence" tests, or has evidence of previous unambiguous recognition, thereby confining further inquiry on the point of continuous existence to the period since the latest date of previous unambiguous recognition. On the other hand, 25 C. F. R. Section 83 still compels petitioners to undertake the same invasive investigations of the individual histories of tribal members and their ancestors, as well as others, including non-Indian relations and non-Indians who figured in that history, regardless whether they are previously recognized that the old regulations required. This is particularly true for petitioners seeking to meet the "high evidence" tests under the BAR process.

S. 611 (6)(b)(2)(c) (which states the CRITERIA FOR SUFFICIENT EVIDENCE for Community), and (3)(c) (which states exceptions which apply in the cases of certain petitioner that meet criteria "high evidence" tests, thereby proving that the petitioner is a historic AUTONOMOUS ENTITY), provide petitioners with a decreased burden in the production of evidence, but only from "the date of the applicable action described" in that subsection, and ending on the date of submission of the petition. Otherwise, S. 611 increases the petitioner's burden by requiring a time depth of at least 130 years. Evidently, the "higher" the character of the evidence a petitioner provides is, the more likely that evidence is going to consist, necessarily, of personal secrets and confidential information of the petitioner and its members.

For example, under Subsection (c), providing CRITERIA FOR SUFFICIENT EVIDENCE- (iii) DISTINCT CULTURAL PATTERNS, a petitioner must show that "Not less than 50 percent of the members of the group maintain distinct cultural patterns including language, kinship or religious organizations, or religious beliefs or practices." Under (C)(3), AUTONOMOUS ENTITY- (ii) ISSUES OF PERSONAL IMPORTANCE, a petitioner must show that "Most of the membership of the group consider issues acted upon or taken by group leaders or governing bodies to be of personal importance." Under (iii) of the same subsection, POLITICAL PROCESS, the petitioner must demonstrate that "There is a widespread knowledge, communication, and involvement in political processes by most of the members of the group," particularly because the criteria assume, under (iv) LEVEL OF APPLICATION OF CRITERIA, that "The group meets the criterion described in paragraph (2) at more than a minimal level." Further, S. 611 will rely, at the same subsection, on evidence of (v) INTRAGROUP CONFLICTS:- "There are intragroup conflicts which show controversy over valued group goals, properties, policies, processes, or decisions." Again, in order to satisfy any of these criteria, the petitioner and Commission will have to probe deeply and subjectively into deeply private aspects of tribal members' lives.

S. 611, like the current process, would demand the same sort of wide-ranging disclosure of the intimate details of tribal members' lives, at the same great risk of permanent loss of privacy on the part of informants, with no better assurance of a beneficial outcome. Faced with the 25 C. F.

R. Section 83 criteria and *Guide* to the process, and the demand for confidential information, the first challenge petitioners inevitably face in the Federal acknowledgment process is persuading current members, and applicants for tribal membership, to make faithful disclosures of an extremely sensitive personal nature to the petitioner's research staff. The same would be true under S. 611 (5)(b). In signing the privacy waivers that normally accompany membership application forms, tribal members and applicants must voluntarily accept that the petitioner must document these disclosures in the exhaustively detailed, permanent Federal administrative record of the petitioner's case for acknowledgment before BAR.

Moreover, the invasiveness of the interview questions generally is likely to be, if anything, far more extensive than some the U. S. Census Bureau is administering in the long census form this year. Here one encounters the very sort of "nastiness" in the process which so many petitioners and their tribal members, and perhaps even those who administer the process, find objectionable. Tribal members must not only prove they are "Indian by blood," but "Indian" in every significant aspect of their social and political life, literally by the book, and they must be willing to expose their most intimate emotional and social bonds to one another for all to read. The U. S. never requires this degree of self-examination and revelation of any other kind of political body it as a condition of acknowledging amicable intergovernmental ties. Tribes often find difficulty in engaging their otherwise law-abiding and compliant members in responding to demands for disclosures in the truly adversarial context of the BAR process. The BAR *Guide*'s admonition to petitioners, "Remember that ***everything you submit becomes the property of the government,***" justifies caution and even reticence on the part of petitioners to divulge confidential tribal information, and the private information of their members.

In search of evidence of community interaction, BAR has gone to the extent of requesting that petitioners provide members' phone bills or phone logs for a time span of ten years or more, and other records most people are unlikely to preserve even as long as a year. Again, telephone numbers are among the items that may be protected under the Privacy Act, particularly if they are unlisted. The success of a petition may depend on documentation of members' participation in funerals, weddings, graduation parties, as well as birthday parties, baptisms, confirmations, traditional tribal ceremonies over the period of their lifetimes, and from at least 1900 to the present. S. 611 would require petitioners to obtain, organize, analyze, and present essentially the similar disclosures, covering an additional thirty years.

Like 25 C. F. R. Section 83.7, *ff.*, S. 611, Section 5 (b) would require a massive accumulation, organization, analysis, and disclosure of documentation, derived from family Bibles, personal diaries, property records, and sign-in books, telephone trees, annotated group photos, oral interviews, governmental records, newspaper clippings, scholarly works, and other primary and secondary sources (differing, of course, from the BAR process by demanding disclosures to a new time-depth of at least 1871). While many federally-recognized tribes have extensive archaeological collections and archives in their tribal museums and offices, few have--and none are expected to obtain or retain--the sorts of detailed information on their members that the BAR process, and S. 611, expect of unrecognized tribes. The BAR process and S. 611 require tribal

members to make extensive personal disclosures in the course of documenting their genealogies and personal histories that no ordinary community archival project would require. Tribal members are expected to respond exhaustively to written or oral interviews, at the hand of their own tribe's consultants as well as to BAR staff, often on video or audio tape, regarding their family relations and political and social acts as tribal members.

Many tribes lacked access to the technology or resources until very recently to obtain or preserve such often-fragile and ephemeral unpublished sources, to the extent they ever were available to Indians . In rolling the threshold back to 1871 for requiring the production of evidence of continuous autonomous political activity and community life, S. 611 would divert petitioners and the Commission from clarifying the record on evidence of continuous autonomous political activity and community life where it counts most under the 25 C. F. R. Section 83--in the span of the 20th century, to the present--while increasing the cost to petitioners, and extending the probing into tribal members' personal histories to an even greater time depth than has been true for acknowledgment petitioners since 1994, thereby escalating the danger of the misuse of privacy-sensitive records.

Finally, probably the best and most disquieting example of how the BAR's *Guide* addresses the petitioner's concern for privacy or confidentiality is this: "[T]he regulations try to ensure that each petitioner's case will be treated fairly, that the review will be complete, and that all parties have a chance to present information and to get access to information about the case." [*Emphasis added.*] While the new BAR procedures of February 11, 2000 declare that the BAR Staff are unlikely to pursue extensive research in field visits, or conduct substantial additional research of their own beyond the submissions of petitioners and interested third parties, these new procedures in no way reduce the burden on petitioners to disclose substantial quantities of their members' confidences voluntarily, and to bear the same risk of possible inconvenience and damage to the petitioner's members, and indeed, to the entire community.

We think it is appropriate here to respond to the BAR and BAR *Guide*'s approach to privacy issues in light of Governor Louis Roybal's testimony on S. 611 before the Committee at the May 24, 2000 hearing:

> Not only are unacknowledged tribal religious leaders asked to disclose sacred sites, ceremonial practices, and sacred knowledge in order to prove the cultural validity of the people, which goes against every instinct and norm which says that this information is not to be shared, filmed, or recorded in any way. Unrecognized tribes are also asked to document very personal, private, sacred, painful, family, clan information which no other person in the United States is forced to disclose. Petitioners are asked about family memories and information about deceased individuals which may include memories of abuse, abandonment, or other family problems. There is never any thought given to what the emotional effects are of asking people to recall these memories for the public record.
>
> While we understand the goal of the current acknowledgment criteria which require evidence of social interaction and political influence and participation, the criteria are inherently flawed since social interaction or the existence of community life is 1) very difficult

to quantify; 2) highly subjective; and 3) may be a poor or insignificant indicator of a tribe's activity. How can people within a tribe prove to the BIA (in terms that they feel is sufficient) whom one talks to, interacts with, or has ties to on a daily, weekly, monthly, and yearly basis? At what level does a conversation or interaction become proof of tribal existence? And then at what point does a lack of conversation or interaction mean that a tribe does not exist? Who decides and what Guidelines are being used to make these decisions? ***The benchmarks or theoretical paradigms should be consistent, based on scientific indicators, and made public.*** *[Emphasis added.]*

A Dilemma of the Federal Acknowledgment Process: How Can Participants in The Federal Acknowledgment Process Disclose Confidential And Sensitive Information Without Risking Destructive Publication And Invasion of Privacy?

The strongest focus of BAR's and petitioners' research has been less on the Indian genealogical character of the membership of unacknowledged tribes, than on the frequency, pattern, and character of often deeply personal intra tribal communications in the 20th century, the period in which the private and secret information is freshest, and often most sensitive to the subjects. In dealing with these confidential data, the S. 611 Recognition Committee *should* assure petitioners due process and a fair evaluation, while providing protection from inappropriate and needless public disclosures of personal and private information to interested parties and the public than the present BAR process does. This will not happen without remedial action from Congress, perhaps in the form of instructions embedded in the language of S. 611, or technical amendments to the Freedom of Information Act and the Privacy Act.

The trouble with the BAR's handling of petitioners' privacy-sensitive disclosures presently arises once BAR obtains privacy-sensitive disclosures, and proceeds to share them with interested parties and to disseminate their contents, not to courts that require disclosure of the records, but to the press or the general public. The BAR's disclosures to interested parties under the Freedom of Information Act–or on a more casual basis–often have been a source of needless embarrassment or damage to petitioners, and even to non tribal members. Sections 6 and 7 of S. 611 contemplate full disclosure by the Commission of all submissions for an against petitions to the petitioner and any interested supporting or opposing parties, without apparent consideration for the privacy and confidentiality issues such disclosures inevitably would entail.

In one Federal acknowledgment case before BAR in our acquaintance, a petitioner began receiving phone solicitations from a representative of would-be investors one day, proposing funding for the Tribe's economic development enterprises. Apparently, the representative somehow obtained inside information from BAR that the Tribe was about to receive notification that it was being placed on the "Ready for Active Consideration" list that week. The unwanted and persistent phone solicitations started at least two days before notice was mailed to the petitioner. Such disclosure of inside information raised the question whether privacy-sensitive materials also were easily accessible to interested parties, even such presumably friendly but unauthorized parties as those with business interests, and scholars seeking sources for writings

intended for publication. Unauthorized BAR disclosures privacy-sensitive petition materials allegedly have occurred in some instances, to the detriment of petitioners, and perhaps even to third parties.

In more than one case to our knowledge, petitioners have complained about BAR's purported release of confidential documents to hostile interested parties, allegedly by persons with access to petition submissions before BAR, including documents protected under the Privacy Act. In past years, it is widely believed among petitioners that BAR has indulged interested parties, including former BAR staff representing other client interests, with broad access to confidential information in petitioners' submissions, even without requiring the submission of formal requests under the Freedom of Information Act, or consistent with the Privacy Act of 1974.

Within the past five years, the BAR's staff seem to have become more circumspect in making disclosures of information, particularly genealogical materials that are protected both under the 25 C.F.R. 83 criteria and the Privacy Act. However, assuring the security of non-genealogical confidential data remains difficult for BAR under its own disclosure requirements and the Freedom of Information Act, even if it wants to provide that protection. The same might be true for the S. 611 Commission, unless Congress give the Commission specific direction on these points.

The BAR *Guide*'s proposed remedy for avoiding inadvertent release of privacy-sensitive petition exhibits and narratives to the public may have a chilling effect on the ability of petitioners to respond to the criteria. The same promises to be true under the S. 611 process. The drawback to a petitioner's attempting through exercising restraint and prudence to protect confidential and private information is that the end result may be the exclusion of certain privacy-sensitive evidence from the record that may be helpful, even essential to a petitioner's case. Under S. 611, Sec. 16 (b), "The Commission shall not be responsible for conducting research on behalf of the petitioner." The Commission cannot be expected to make up for evidence that petitioners cannot or will not provide, for fear of public disclosure. Similarly, a petitioner cannot expect BAR to make up the difference if it becomes impossible for the petitioner to obtain or use certain evidence because of its highly sensitive nature. Section 83.5(c) of the acknowledgment regulations, describing the duties of the Department, provides: ``the Department shall not be responsible for the actual research on the part of the petitioner."

Furthermore, while Section 83.10(a) provides that the Assistant Secretary -- Indian Affairs may ``initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status," and such research remains discretionary for BAR, the regulations never made any additional research mandatory. Indeed, due to the Privacy Act, investigations targeting the gathering and scrutiny of petitioner's confidential information might prove problematic for the Administration. Unfortunately, then, a petitioner's failure sufficiently to subject their members' most confidential and painful histories to possible public review may result in the denial of acknowledgment.

Formerly, BAR staff have used this section to justify substantial additional research to supplement a petitioner's research and compensate for perceived deficiencies, even after petitioners have responded as comprehensively as possible to one or more technical assistance letters from BAR. The BIA no longer thinks this research is appropriate or necessary. Therefore, the Assistant Secretary -- Indian Affairs is not requiring BAR staff to locate new data to any substantial extent. BAR staff only will verify and evaluate the materials that petitioners and third parties submit. In an effort to shorten the time lag in the process and resolve the backlog of pending cases, BAR no longer will no longer attempt to discover information petitioners do not find or are unwilling to disclose, and the result may be the absence of information from the record that could be essential to the success of a petition.

Until February 2000, petitioners always could expect that BAR would provide *technical reports* (historical, anthropological and genealogical) with the Proposed Findings. Under the new *Procedures* for processing petitions, these reports–if they exist--no longer will appear with the *Proposed Findings*. While the elimination of publication of such reports may protect some privacy-sensitive details of petitions from public scrutiny, it will be more difficult if not impossible for petitioners to remedy an information deficit during the response period after the preliminary finding for lack of direction. A similar problem may arise under the S. 611 Commission, where the Commission keeps the details of its thinking close.

Before the change in BAR procedures in February 2000, the BAR published genealogical, historical and anthropological technical reports with the preliminary determination. Now, BAR only offers technical summaries on a grid format with *Proposed Findings*. The unavailability of technical reports earlier than the publication of a final determination, after the extraction of so much qualitative and quantitative data from a petitioner, may present a distinct disadvantage to tribes now facing active consideration under the 25 C. F. R. Section 83 process. In lieu of the full *technical reports* that BAR has published on the Federal Register and on its web site, BAR will refer petitioners and interested parties to the past technical reports as models for how BAR evaluates kinds of evidence.

These reports have been helpful keys to BAR's "thinking," and because they are widely available now on the internet, petitioners and others have learned to rely upon them as useful reference tools. The acknowledgment process will continue to apply the precedents that these past decisions have established. Indeed, the *Notice* acknowledges that the "established precedents now make possible this more streamlined review process." The conclusions BAR reached in those *technical reports* evidently relied on considerable bodies of confidential information. These models suggest that petitioners now must voluntarily produce voluminous quantities of confidential information for BAR consistent with the new February 11 *Procedures*, along with their own *technical reports*, relying on BAR's model reports, or risk declination. The S. 611 Commission doubtless will impose the same requirements regarding narrative submissions such as *technical reports* as BAR does now.

The production of *technical reports* of the professional caliber BAR expects to review is a

daunting undertaken. Oddly enough, the BAR still counsels petitioners to avoid seeking professional assistance that would help petitioners avoid the pitfalls and hazards that too frequently arise in the course of the process in the cause of thrift, and indeed, BAR urges petitioners, to eschew retaining professional assistance, using the enticement of thrift: "The more of the work your members do themselves on a volunteer basis, the cheaper it will be. The more consultants and lawyers you employ, the more expensive the process becomes."

However, petitioners already know that BAR avails itself of professional expertise in every case in anticipation of possible litigation, regardless whether the active consideration of a case results in a positive or negative final determination. Petitioners usually have little knowledge of their rights and responsibilities, or those of the BIA, under the Freedom of Information Act or the Privacy Act. Petitioners therefore are ill-advised to indulge in the false economy of walking through the BAR's gauntlet without counsel. BAR's technical advice to petitioners to avoid retaining "consultants and lawyers" is an invitation to disaster, in view of the record of the 25 C.F.R. 83 process, the high incidence of administrative appeals and litigation involving acknowledgment cases, and the need to protect the content of petitioners' submissions.

S. 611 evidently assumes that litigation may conclude any acknowledgment case, and that professional consultants and legal counsel will be necessary to all parties under the S. 611 process, as they are under the present one. It is forseeable that under certain circumstances such litigation may involve the Commissioner's disclosure of material before them, regardless whether the petitioner or some interested party submits it, that is otherwise protected under the Privacy Act. These circumstances may include FOIA disclosures to interested parties seeking to acquire petition narratives, not to use as general models for their submissions, but specifically in order to steal the petitioner's identity and make conflicting claims to be the very political entity the petitioner claims to be.

Under the present process, regardless of BAR's technical advice on segregating privacy-sensitive materials in the narrative submissions, a petitioner's only remedy to avoid disclosure of such things as intimate details of ritual activities, the sites of ritual activities, and the identities and roles of leaders and other participants in spiritual or religious activities, may be to redact such material from the petition (if it already has been submitted), or to withhold it if at all possible, or to rely on legal remedies, including litigation, to protect their intellectual property and privacy. At the point a rump group claims a petitioner's identity through communications to BAR and others, a petitioner's remedy may have to be a suit for false pretenses, a complaint for mail fraud, or another appropriate legal remedy.

Regardless of the importance role some confidential information may have in establishing their case for recognition under 25 C. F. R. 83.7 (b) and (c), petitioners who remain accountable to their own cultural norms and rules may find it necessary to maintain secrecy regarding certain internal matters. While the Privacy Act protects information regarding the date and place of burial of petitioners' ancestors, it may not afford enough protection for petitioners after details of the whereabouts of Indian cemeteries enter the petition record. Moreover, while the legislative

history of the Native American Grave Protection and Repatriation Act of 1992 suggests that members of unacknowledged tribes may have the right to protection under the Act, the administrative interpretation and implementation of the Act ignores the rights of members of unacknowledged tribes to the extent that even documented lineal descendants of deceased members of unrecognized tribes have little real protection, in practice. It is entirely possible for disclosure of an unacknowledged tribe's burial sites to lead to confiscation and desecration.

As drafted, S. 611 does little, if anything, to prevent the disturbing excesses of the acknowledgment process with regard to disregard for petitioners' privacy and confidentiality concerns. Conversely, the Act would do much to assure procedural protections for interested parties (for and against a petition), without qualification, by assuring broad disclosure of petition submissions to the public. One can only hope the proposed S. 611 Commission would consider the lessons of the BAR process in considering how to address petitioners' privacy, confidentiality, and disclosure issues. While the BAR recently has begun to evince some concern for the privacy and confidentiality concerns of petitioners, the BAR's solicitude regarding disclosures of submissions by "interested parties" nearly always has extended to near-blackout of the copies of the administrative record which petitioners may obtain from the BAR in response to requests under the Freedom of Information Act. Often, such parties include claimants to the very tribal identity of a petitioner. It is very possible for petitioners to reach Active Consideration under the pall of an interested party's spurious claims, even claims that a separate group of persons is the entity that the petitioner of record claims to be, without ever learning the names or identities of the interested parties attacking the principal case, or how petitioners can address such adverse claims effectively.

We recommend that Congress provide the S. 611 Committee specific direction in Sections 6 and 7 regarding the appropriate handling and disclosure of petitioners' documentation relating to issues such as hostile interactions within families or among the various social sectors of the tribal group, as well as in describing and characterizing such things as ritual participation and use of sacred space, and the content of community gossip, as well as details of private vendettas, quarrels, and feuds or other matters whose disclosure to the general public could bring harm, humiliation or opprobrium upon the subjects.

Toward a Possible Solution to the Problem of Protecting Private and Confidential Tribal Information from Needlessly Harmful Publication

A perusal of the "established precedents" before BAR does not disclose evidence that BAR employs the modern social networking tools and methodologies that could provide the key for avoiding the problem of protecting the privacy and confidentiality of petitioners' privacy-sensitive disclosures. As Governor Louis Roybal testified on May 24 on S. 611, "***The benchmarks or theoretical paradigms should be consistent, based on scientific indicators, and made public.***" The historian Alfred Crosby proposed (1997) that visualization is one of only two factors that are responsible for the explosive development of all of modern science, the other of which is measurement. It should be possible for petitioners to quantify their data and produce

visualizations that could spare them the risk of public exposure of participants in various relationships, while providing the BAR with corresponding annotations that would serve to protect sensitive qualitative data and details while corroborating their quantified analysis. [See: Linton C. Freeman, "Visualizing Social Networks" (*Journal of Social Structure*: Carnegie Mellon, 1998).]

Normal sociological and anthropological professional practice can and should protect the political, spiritual, psycho-sexual, and other characteristics of individual members. Aside from recommending the use of popular genealogical computer applications to record and analyze genealogical data, BAR has neither recommended nor made use of certain widely-used, "state of the art" sociological and anthropological methodologies and tools for investigating, measuring and quantifying, and visualizing political interaction and social networking data, to address the criteria at 25 C. F. R. Section 83.7 (b) and (c). [See: L. C. Freeman, *Patterns of Local Community Leadership* (Indianapolis: Bobbs-Merrill, 1968); see: A. W. Wolfe, "The Rise of Network Thinking in Anthropology" (*Social Networks* 1, 53-64, 1978); see: P. Hage, and F. Harary, *Structural Models in Anthropology* (Cambridge: Cambridge University Press, 1983); and see: D. M. Kirke, "Collecting Peer Data and Deliniating Peer Networks in a Complete Network" (*Social Networks*, 18, 333-346, 1996).]

Since 1941, when the sociologists Leonard and Loomis drew a complex two-dimensional image of various kinds of visiting patterns as an overlay on a map of physical sites occupied by families for their study El Cerrito in rural New Mexico,"Culture of a Contemporary Rural Community--El Cerrito, New Mexico" (Washington, D.C.: U. S. Department of Agriculture), a body of literature has emerged providing visualization of social networks. Recently, Linton C. Freeman reviewed the use of pictorial images in social network analysis. It shows that such images are critical both in helping investigators to understand network data and to communicate that understanding to others. Freeman's paper reviews the long history of image use in the field, from illustrations of the earliest hand-drawn images in which points were placed by using *ad hoc* rules, through the development of systematic procedures for locating points. It goes on to discuss how computers have been used to actually produce drawings of networks, both for printing and for display on computer screens. Finally, it illustrates some of the newest procedures for producing web-based pictures that allow viewers to interact with the network data and to explore their structural properties. [See: Linton C. Freeman, "Visualizing Social Networks" (*Journal of Social Structure*: Carnegie Mellon, 1998); see: S. Wasserman, and K. Faust, K., *Social Network Analysis: Methods and Applications* (Cambridge: Cambridge University Press, 1994).] The quantification of qualitative social networking data is a bustling enterprise, yet the published literature applying these methodologies is rather barren regarding American Indian communities, including candidates for Federal acknowledgment and terminated tribes.

For example, using computer applications such as MAGE, in 1994, Webster generated a three-dimensional representation of data on friendship ties collected at a residential college at an Australian university. [All 217 residents were interviewed individually and asked to name their friends within the college. The residents were also asked to indicate the strength of each

friendship tie. The original matrix was symmetrized, then analyzed using correspondence analysis. See: C. M. Webster, "A Comparison of Observational and Cognitive Measures" (*Quantitative Anthropology* 4, 313-328, 1994). UCINET, KRACKPLOT, and other applications that have emerged in the past 30 years, adapted from chemistry and other disciplines, are proving helpful to sociologists. [See: L. C. Freeman, "Computer programs in social network analysis" (*Connections* 11, 26-31. 1988); see: D. Krackhardt, J., Blythe, and C. McGrath, *KrackPlot 3.0 User's Manual* (Pittsburgh: Carnegie-Mellon University, 1995).]

BAR evidently does not presently employ these tools or methodologies in a manner that might allow petitioners to protect private and sensitive material, while allowing reasonable access to document submissions by interested parties and the general public. Our own inquiries with BAR staff suggest little or no familiarity with or use of recent advances in the field, although the staff routinely rely on the basic approaches and strategies common to social networking studies. There is no mention in the BAR *Guide* of these tools and methodologies, or their potential utility in social networking analysis as an alternative to the public exhibition of sensitive personal data in a manner that, particularly in a small population, could have damaging effects on the lives of the human subjects (tribal members) for the rest of their lives. [See: C. Proctor, C., "Informal Social Systems," in C. P. Loomis, J. O. Moralis, R. A. Clifford, and O. E. Leonard (Eds.), *Turrialba* (pp. 73-88), Glencoe, IL: Free Press (1953); see: C. M. Webster, *Task-related and Context-based Constraints in Observed And Reported Relational Data.* Ph.D. Dissertation, University of California, Irvine (1993).] While the use of such tools serves the public interest in solving crimes worldwide by detecting patterns of relationships among suspects and victims, an unrecognized tribes and no other non-criminal segment of American society, including any federally-recognized tribe, is subject to the degree of invasive and very public exposure of private and confidential matter without any assurance of procedural protection that passage through the 25 C. F. R. Section 83 process often entails, and the S. 611 offers to perpetuate. The use of modern social networking tools and methodologies provide the means to avoid at least the destructive publication and invasion of privacy that petitioners otherwise may risk under either process.

Meanwhile, both under the present regulations, and under S. 611 as proposed, adversarial interested parties including the Federal government maintain the upper hand throughout the process, rarely needed to subject themselves to anything corresponding to the intense degree of interrogation and hostile inquiry to which petitioners are subject. Governor Roybal also testified before the Committee on May 24, that:

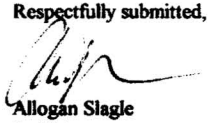
> There appears to be a great and explicit solicitude without qualification toward the concerns of third parties in S. 611. Third parties / interested parties should have something definite at stake in order to get involved in a recognition determination. Under the present process, it is far too easy for thin, libelous, and untested claims to be accorded inordinate weight against a petitioner.
>
> A related weakness of the current process is that on occasion, third parties consisting of "rump groups" or splinter groups claiming some association or right of affiliation with the petitioner can make claims to be the petitioner, or otherwise challenge the petitioner, and

sidetrack or virtually derail a petition. The BAR process also has accorded the claims of such "rump" or splinter groups varying degrees of credibility. However, BAR offers little practical alternative to disposing of such claims except to consider them simultaneously. Once a tribe goes on "Ready" or "Active Consideration," another party can claim the petition as their own. They can obtain large portions of the petition submissions under the regulations and the Freedom of Information Act, then resubmit it (with some or few revisions) as their own.

In our own case, we have pressed for protection of the privacy of our individual members and of our cultural heritage, and gradually negotiated with BAR to protect these materials, relying not only on 25 C.F.R. Section 83 and the Privacy Act of 1974, but on such things as the limits imposed on the Tribe's use of sensitive materials by applicants for membership at the time they signed privacy waivers as part of the Tribe's membership application process.

If it is not possible for Congress to reform the acknowledgment process statutorily at this time, perhaps Congress could help the Administration address some of the inequities of the process in relation to the sometimes-inquisitorial nature of the Federal acknowledgment inquiry that tends to qualify petitioners out of existence. The Administration might be encouraged to take a step in the right direction by suggesting the use of the social networking tools and methodologies reviewed here in brief at BAR, and encouraging the use of these tools and methodologies in acknowledgment work generally. Congress eventually could help by requiring its S. 611 Commission to employ these current methodologies for quantitative measurement and visualization of social networking, and encouraging the widespread use of this technology by petitioners. This might make it possible to cloak sensitive information from needless or harmful scrutiny, while displaying findings to the public in a coherent, incisive, and edifying manner.

Respectfully submitted,



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June 6, 2000

VIA OVERNIGHT DELIVERY

Hon. Ben Nighthorse Campbell
Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Bldg.
Washington, DC 20510

Re: Hearings on S. 611

Dear Chairman Campbell:

As counsel for the Tulalip Tribes of Washington, I am writing to express the Tulalip Tribes' opposition to the enactment of S. 611 unless certain amendments are made to strengthen the legislation to assure that only real Indian tribes are recognized, and that acknowledgment is not extended to Indian social organizations or claims groups formed in this century; to assure consistency in acknowledgment decisions made by the Commission and the Secretary and in the process each follows; and to assure a fair right of participation by recognized Indian tribes in acknowledgment proceedings and afford them a right of appeal. The Tulalip Tribes would ask that you consider these matters in your deliberations on the bill.

1. **Eligibility.** The Tulalip Tribes do strongly support the inclusion of the provisions of Section 5(a)(2)(E) in S. 611which would deny eligibility for acknowledgment groups that have been the subject of prior adverse Federal Court adjudications concerning their alleged tribal or treaty status. In furtherance of the goal that consistent standards apply to acknowledgment, the Tulalip Tribes urge that such provisions be made applicable both to petitions that are transferred to the Commission for decision, and also to those that remain with the Secretary. The Tulalip Tribes also urge that a threshold determination of eligibility of petitioners under the provisions of Section 5(a)(2) be made not later than the preliminary hearing phase of the process, and, as to petitions that remain with the Secretary, not later than the early stages of the active consideration phase. The Tulalip Tribes propose the following amendments for these purposes:

SECTION 8 (b) DETERMINATION-
(1) IN GENERAL- Not later than 30 days after the conclusion of a preliminary

hearing under subsection (a), the Commission shall make a determination--

(A) as to whether the petitioner is excluded from acknowledgment by one or more of the provisions of Section 5(a)(2), and, if so, the Commission shall deny the petition; or

(BA) to extend Federal acknowledgment of the petitioner as an Indian tribe to the petitioner; or

(CB) that provides that the petitioner should proceed to an adjudicatory hearing.

As to petitions that remain with the Secretary for decision, the Secretary shall determine, not later than the early stages of active consideration of a petition, as to whether the petitioner is excluded from acknowledgment by one or more of the provisions of Section 5(a)(2), in which case the Secretary shall deny the petition.

2. Strengthened criteria for acknowledgment. To further strengthen the legislation to assure that only real Indian tribes are recognized, and that acknowledgment is not extended to Indian social organizations or claims groups formed in this century, the Tulalip Tribes urge that the the following amendments be made to S.611:

SECTION 3 (7) COMMUNITY- **(A) IN GENERAL- The term `community' means any group of people,** a predominant portion of which live in a specific geographic core area, **that is able to demonstrate that--**

(i) consistent interactions and significant social relationships exist within the membership; and

(ii) the members of that group are differentiated from and identified as distinct from nonmembers.

SECTION 5(b) PETITION FORM AND CONTENT- **Except as provided in subsection (c), any petition submitted under subsection (a) by an Indian group Shall be in any readable form that clearly indicates that the petition is a petition requesting the Commission to recognize the Indian group as an Indian tribe and that contains detailed, specific evidence concerning each of the following items:**

* * *

(2) EVIDENCE OF COMMUNITY-

(A) IN GENERAL- A statement of facts establishing that a predominant portion of the membership of the petitioner--

(i) comprises a community residing within a specific geographic core area **distinct from those communities surrounding that community; and**

(ii) has existed as such **a community from historical times to the present.**

(B) EVIDENCE- the Commission shall require evidence that a predominant portion of the membership of the petitioner comprises a community residing

within a specific geographic core area. In addition to such required evidence, evidence that the Commission may rely on in determining that the petitioner meets the criterion described in clauses (i) and (ii) of subparagraph (A) may include 1 or more of the following items:

* * *

(C) CRITERIA FOR SUFFICIENT EVIDENCE- The Commission shall consider the petitioner to have provided sufficient evidence of community at a given point in time if the petitioner has provided evidence which ~~that~~ demonstrates that ~~any one of the following:(i) RESIDENCE OF MEMBERS- M~~more than 50 percent of the members of the group of the petitioner reside in a particular geographical area exclusively or ~~almost exclusively composed of~~ predominantly occupied by members of the group, and the balance of the group maintains consistent social interaction with some members of the community; and any one or more of the following:

(ii) MARRIAGES- Not less than 50 percent of the marriages of the group are between members of the group.

(iii) DISTINCT CULTURAL PATTERNS- Not less than 50 percent of the members of the group maintain distinct cultural patterns including language, kinship or religious organizations, or religious beliefs or practices.

(iii~~v~~) COMMUNITY SOCIAL INSTITUTIONS- Distinct community social institutions encompassing a substantial portion of the members of the group, such as kinship organizations, formal or informal economic cooperation, or religious organizations.

(iv) APPLICABILITY OF CRITERIA- The group has met the criterion in paragraph (3) using evidence described in paragraph (3)(B).

(3) AUTONOMOUS ENTITY-

(A) IN GENERAL- A statement of facts establishing that the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the time of the petition. The Commission may rely on 1 or more of the following items in determining whether a petitioner has maintained such political influence or authority at a given point in time~~meets the criterion described in the preceding sentence:~~

(i) MOBILIZATION OF MEMBERS- The group is capable of mobilizing significant numbers of members and significant resources from its members for group purposes.

(ii) ISSUES OF PERSONAL IMPORTANCE- Most of the membership of the group consider issues acted upon or taken by group leaders or governing bodies to be of personal importance.

(iii) POLITICAL PROCESS- There is a widespread knowledge, communication, and involvement in political processes by most of the members of the group.

iv) LEVEL OF APPLICATION OF CRITERIA- The group meets the criterion described in paragraph (2) at more than a minimal level.

(v) INTRAGROUP CONFLICTS- There are intragroup conflicts which show controversy over valued group goals, properties, policies, processes, or decisions.

(B) EVIDENCE OF EXERCISE OF POLITICAL INFLUENCE OR AUTHORITY- The Commission shall consider that a petitioner has provided sufficient evidence to demonstrate the exercise of political influence or authority at a given point in time by demonstrating that group leaders or other mechanisms ~~exist or have~~ existed at such point in time that accomplished the following:

(i) ALLOCATION OF GROUP RESOURCES- Allocate group resources such as land, residence rights, or similar resources on a consistent basis.

(ii) SETTLEMENT OF DISPUTES- Settle disputes between members or subgroups such as clans or moieties by mediation or other means on a regular basis.

(iii) INFLUENCE ON BEHAVIOR OF INDIVIDUAL MEMBERS- Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms and the enforcement of sanctions to direct or control behavior.

(iv) ECONOMIC SUBSISTENCE ACTIVITIES- Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(C) TEMPORALITY OF SUFFICIENCY OF EVIDENCE- A group that has met the requirements of paragraph (2)(C) at any point in time shall be considered to have provided sufficient evidence to meet the criterion described in subparagraph (3)(A) at that point in time.

SECTION 5(c) EXCEPTIONS- A petition from an Indian group that is not excluded from acknowledgment by Section 5(a)(2), and that is able to demonstrate by preponderance of the evidence that the group ~~was, or~~ is the successor in interest to, a –

(1) party to a treaty or treaties; or

~~(2) group acknowledged by any agency of the Federal Government as eligible to participate under the Act of June 18, 1934 (commonly referred to as the "Indian Reorganization Act") (48 Stat. 984 et seq., chapter 576; 25 U.S.C. 461 et seq.);~~

~~(3) group for the benefit of which the United States took into trust lands, or which the Federal Government has treated as having collective rights in tribal lands or funds; or~~

(24) group that has been denominated a tribe by an Act of Congress or Executive order, shall be required to establish the criteria set forth in this section only with respect to the period beginning on the date of the applicable action described in paragraph (1); or (2), ~~(3), or (4)~~ and ending on the date of submission of the petition.

Acknowledgment of a government to government relationship between the United States and an Indian tribe, as sovereigns, is business of the most serious magnitude, and the criterion for such acknowledgment should be sufficiently strong to assure that only real Indian tribes, which can demonstrate their historical existence, are recognized. While it is important that the legislation address the kinds of evidence that may be considered to establish tribal existence at any given point in time, the language of S.611 should clearly indicate that such existence must be proven from the time of first sustained contact with Euro-Americans, in order to assure that groups of only modern vintage are not recognized.

In the view of the Tulalip Tribes, the proposed amendments that would include a geographic core community requirement are necessary to assure that groups which are recognized have in a predominant number of members that in fact have resided together in a tribal geographic community in a particular area. Such a requirement serves to distinguish groups that have had and continue to have tribal relations among their membership by living in a tribal geographic community such tribal relations are likely to have occurred in their daily lives, from groups that may have had some social interaction among their members, but which are not concentrated in a particular area, and are scattered among non-Indian populations, such that they have become assimilated into non-Indian society. In the view of the Tulalip Tribes, such scattered groups that keep in touch only through periodic meetings or events, or by phone, mail or modem, are not real Indian tribes.

The proposed amendments to the exceptions in Section 5(c) are appropriate to clarify that groups excluded from acknowledgement by Section 5(a)(2) are not included in the groups to which such exceptions may apply; and to assure that the exceptions are limited to circumstances where serious consideration was given to acknowledgment of a government to government relationship with an Indian tribe, at a national level by an appropriate agency, and that a formal decision was made to acknowledge such relationship, as occurs when a treaty is made with an Indian tribe. The other exceptions that the Tulalip Tribes propose be stricken from Section 5(c) involve circumstances in which such serious consideration and decision may or may not have occurred. For example, acknowledgment of eligibility of a group to participate under the Indian Reorganization Act, or a trust acquisition decision, may have occurred at a local level of an Indian agency, without such consideration or decision by the Central Office. Or the decision may have been made by an official or agency without expertise as to whether the group satisfies

the considerations for acknowledgment that apply when a treaty is made with a tribe, or an Act of Congress recognizes a tribe.

4. Affording recognized tribes a fair right of participation in acknowledgment proceedings, and right to appeal acknowledgment decisions. The provisions of Section 8(a) allowing concerned parties to submit evidence and argument at a preliminary phase of the acknowledgment process, are an important component of the participation by recognized tribes that needs to be provided in order to assure that opposing parties' views and evidence are given fair consideration in the acknowledgment process. The Tulalip Tribes submit that the following proposed amendments are also necessary and appropriate for these purposes:

SECTION 3 -- NEW DEFINITION

Concerned party -- the term 'concerned party' means the state in which a petitioner, or any significant portion of a petitioner's membership, resides, and all federally recognized Indian tribes located in such state, as well as all federally recognized Indian tribes who claim to be the successor in interest of any tribe that was a party to a treaty to which a petitioner also claims to be a party, or the successor in interest of a party.

SEC. 8. PRELIMINARY HEARING.
(a) IN GENERAL- Not later than 60 days after the receipt of a documented petition by the Commission submitted or transferred under section 5(a) or submitted to the Commission pursuant to section 6(a)(2)(B), the Commission shall set a date for a preliminary hearing-, giving due consideration to the complexities of the issues and the need for adequate preparation time for the parties to have a fair opportunity to present their positions. At the preliminary hearing, the petitioner and any other concerned party may provide evidence concerning the status of the petitioner.

* * *

(c) INFORMATION TO BE PROVIDED PREPARATORY TO AN ADJUDICATORY HEARING-
(1) IN GENERAL- If the Commission makes a determination under subsection (b)(1)(B) that the petitioner should proceed to an adjudicatory hearing, the Commission shall--
(A)(i) make available appropriate evidentiary records of the Commission to the petitioner and concerned parties that request the same to assist them in preparing for the adjudicatory hearing; and
(ii) include such guidance as the Commission considers necessary or appropriate to assist the petitioner in preparing for the hearing; and

(B) not later than 30 days after the conclusion of the preliminary hearing under subsection (a), provide a written notification to the petitioner and concerned parties that request the same that includes a list of any deficiencies or omissions that the Commission relied on in making a determination under subsection (b)(1)(B).

SEC. 9. ADJUDICATORY HEARING.

* * *

(d) EVIDENCE BY CONCERNED PARTIES—In any hearing under subsection (a), concerned parties may provide such evidence and argument as they consider appropriate. Such evidence shall be subject to cross-examination by the petitioner. The evidence of the petitioner and Commission staff shall be subject to cross-examination by concerned parties.

SEC. 10. APPEALS.

(a) IN GENERAL- Not later than 60 days after the date that the Commission publishes a determination under section 9(d), the petitioner or any concerned party that participated in the hearing in opposition to the petition may appeal the determination to the United States District Court for the District of Columbia. The sovereign immunity or alleged sovereign immunity of the petitioner shall not bar the joinder of the petitioner to an appeal by a concerned party.

The Tulalip Tribes respectfully submit that recognized tribes have a valid interest in assuring that only real Indian tribes are acknowledged, in order that public respect for the sovereignty of tribes not be eroded; and that recognized tribes also have a unique insight into the evidence concerning whether petitioning groups from their area have in fact historically existed as Indian tribes. Additionally, in some cases, recognized Indian tribes have a cultural identity interest in the identity of a treaty tribe that a petitioner claims to be, particularly where the recognized tribe claims or has been adjudicated to be the successor of the same treaty tribe.

In the view of the Tulalip Tribes, the acknowledgment process should be structured to require the full consideration of the evidence and arguments of recognized tribes, and to afford them a right of appeal, in order to better assure the accuracy of acknowledgment results, and to afford recognized tribes a fair opportunity to protect their cultural interests. Given the complexity of acknowledgment matters, and the significant research and work that precedes a petition, it is appropriate to schedule the hearing on the merits of the petition so as to afford recognized tribes a fair opportunity to gather their evidence and be able to prepare and effectively participate in the hearing.

4. Consistency in acknowledgment decisions made by the Commission and the Secretary and in fairness of acknowledgment process.

In furtherance of the goal that consistent standards apply to recognition matters, and to better the acknowledgment process with respect to petitions that remain with the Secretary for determination, the Tulalip Tribes propose the following amendment as a new section of S.611:

> PROCEEDINGS BEFORE THE SECRETARY—The Secretary shall apply the definition provisions of Section 3, the exclusion provisions of Section 5(a), and the substantive requirements for acknowledgement Section 5(c)) of this Act, and regulations adopted by the Commission to implement the same, in deciding whether to grant or deny petitions for acknowledgment that are not transferred to the Commission, and that remain before the Secretary for decision. In whether to grant or deny such petitions, the Secretary shall conduct preliminary and adjudicatory hearings, and publish final acknowledgment determinations, in the same form and manner as would be required by this Act if the Commission were considering the petition, concerned parties shall have the same rights of participation in such hearings as they would have if held before the Commission, and the appeal provisions of the Act shall also apply to final acknowledgment decisions of the Secretary. The provisions of Section 11 of this Act shall also apply to all acknowledgment determinations that have been made by the Secretary and to all such determinations made by the Secretary in the future.

Thank you for your consideration.

Very truly yours,

BELL & INGRAM, P.S.

James H. Jones, Jr.

cc: Tulalip Tribes' Board of Directors
John McCoy, Tulalip Executive Director of Governmental Affairs
Frank Phifer

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Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

June 21, 2000

The Honorable Ben Nighthorse Campbell
United States Senate
Washington, D.C. 20510-1203

Re: Senate Bill 611

Dear Senator Campbell:

The Nez Perce Tribe wishes to express its opposition to S.B. 611, a bill which would remove the Bureau of Indian Affairs from the process granting federal recognition to American Indian Tribes. While it is true that the BIA process can take several years, the method for addressing that issue is not to politicize the recognition process by turning it over to presidential appointees who may or may not understand the complex issues involved. The better solution is to appropriately streamline the BIA's system.

Federal recognition of an American Indian Tribe, as you are well aware, is a momentous event which creates a sovereign nation, with all the attendant rights and responsibilities which sovereignty involves. While it is crucial that groups which legitimately deserve to be recognized as tribes are so recognized, it is equally important that groups which lack legitimacy not be granted tribal status. Inappropriate recognition would trivialize the sovereignty of current legitimate tribal governments. The process should be removed as far as possible from politics and political agendas. It is for that reason that we respectfully oppose S.B. 611.

Thank you for your time and consideration.

Sincerely yours,

Samuel N. Penney, Chairman

CC: The Honorable Larry Craig
The Honorable Mike Crapo
The Honorable Mike Simpson

Congressional Research Service • Library of Congress • Washington, D.C. 20540

Memorandum April 10, 2000

TO : Senate Indian Affairs Committee
Attention: Paul Moorehead

FROM : Roger Walke
Specialist in American Indian Policy
Domestic Social Policy Division

SUBJECT : Indian Tribe Recognition: Charts of Steps in the Federal Acknowledgment Process

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This memorandum responds to your request for a chart or series of charts depicting the steps in the federal acknowledgment process administered by the Bureau of Indian Affairs (BIA) through its Branch of Acknowledgment and Research (BAR), as we discussed. The federal acknowledgment process, sometimes referred to as FAP, is embodied in part 83 of Title 25 of the *Code of Federal Regulations*. Through FAP, a group claiming to be Indian[1] may, if it meets the regulatory criteria and follows the steps laid out in the regulations, be officially recognized as an Indian tribe, with all attendant powers, privileges, benefits, and responsibilities.

The memorandum has separated the FAP into nine steps, two of which are subdivided into two substeps apiece. Each step and substep is shown in a single chart. The chart for each step presents the CFR sections providing authority for that step, responsibilities of the petitioning and the federal parties during that step, and the number of petitioners presently at that step. The memorandum also includes a table summarizing the number and percentages of petitioners at each step, as well as the year of the earliest and the latest petitioner to reach that step.

The sources for the charts are 25 C.F.R. 83 and the most recent version of the BAR's table, "Summary Status of Acknowledgment Cases,"[2] which is attached. The BAR table also breaks its status information down into steps, but the steps in the table do not always follow the CFR process exactly. The steps in the charts in this memorandum are based chiefly on

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[1] In this memorandum, the term "Indian" refers to American Indians and Alaska Natives (the latter term includes Inuit [or Eskimos], Aleuts, and American Indians in Alaska).

[2] "Summary Status of Acknowledgment Cases (as of April 4, 2000)," unpublished table provided by BAR, April 6, 2000. BAR updates the table periodically. The table is available on the web at the BAR site, at http://www.doi.gov/bia/ack_res.html.

the procedures laid out in 25 CFR 83. The number of petitioners assigned to each step is based on the BAR "Summary Status" table, but some petitioners have been re-assigned from the status shown in the BAR table in order to show the step that petitioner has reached in the process. Notes at the end of the charts list the petitioners assigned to steps 3-8, so the reader may compare CRS's and BAR's assignments of petitioners. Because petitioners assigned to steps 1, 2, and 9 are so numerous, and because none of them were re-assigned from the status shown in the BAR table, they are not listed in these notes; see the attached BAR "Summary Status" table for lists of petitioners in these steps.

The charts' descriptions of authority and responsibilities at each step are not meant to be exhaustive. They may not list all authorities on which a particular step may be based, and they may not describe all responsibilities of petitioners, other parties, and the federal government at each step.

The charts do not show the time limits assigned by the regulations to some steps in the acknowledgment process.

Please call me at 707-8641 if you have any questions regarding this request.

1. Letter of Intent to Petition

Authority: 25 C.F.R. 83.9

Responsibilities
Petitioner's Responsibilities:
- Submit letter of intent
- Begin compiling documentation

AS/IA (BIA-BAR) responsibilities:
- Acknowledge receipt of letter within 30 days
- Announce letter of intent in *Federal Register* within 60 days
- Notify state governor and attorney-general, and related or interested recognized tribes and petitioning groups
- Publish notice of letter of intent in local newspapers

119 petitioners*

(active: 103,
inactive: 10,
ineligible: 6)

2. Documentation of Petition and Review of Documentation

Authority: 25 C.F.R. 83.10(b)-(c), (e)

Responsibilities

Petitioner's Responsibilities:

- Submit initial documented petition to BIA-BAR for review
- Respond to BIA-BAR letters and technical assistance

AS/IA (BIA-BAR) responsibilities:

- Conduct initial review of documented petition
- Provide technical assistance
- Send letter of obvious deficiencies or significant omissions
- Determine whether petitioner meets requirements of previous federal acknowledgment, if claimed
- Determine if little or no evidence that petitioner can meet criteria for descent, non-membership in recognized tribe, or non-termination

47 petitioners*

3. Documented Petitions Ready for Active Consideration

Authority: 25 C.F.R. 83.10(d)

Responsibilities
Petitioner's Responsibilities:
- Submit final documented petition to BIA-BAR

AS/IA (BIA-BAR) responsibilities:
- Notify petitioner that documented petition is ready for active consideration
- Maintain dated register of petitions ready for active consideration

11 petitioners**

4. Active Consideration of Petition

Authority: 25 C.F.R. 83.10(f)-(h)

Responsibilities
Petitioner's Responsibilities:

- Respond to substantive comments on petition

AS/IA (BIA-BAR) responsibilities:

- Notify petitioner of substantive comments on petition and allow response
- Notify petitioner and interested parties that petition is under active consideration, and provide contact information
- Determine whether petition meets the mandatory acknowledgment criteria (25 C.F.R. 83.7)
- Prepare proposed finding to acknowledge or to deny acknowledgment

6 petitioners**

(includes 2 petitioners with amended proposed findings)

5a. Proposed Finding to Acknowledge or Deny Acknowledgment

Authority: 25 C.F.R. 83.10(g)-(j)

Responsibilities
AS/IA (BIA-BAR) responsibilities:

- Publish proposed finding in *Federal Register*
- Prepare summary report

(Petitioner count: see #5b.)

5b. Response to Proposed Finding

Authority: 25 C.F.R. 83.10(g)-(l)

Responsibilities
Petitioner's and Others' Responsibilities:

- Submit arguments and evidence in response to proposed finding, if disagree
- Request formal meeting on the record
- Petitioner: respond to others' comments

AS/IA (BIA-BAR) responsibilities:

- Provide technical advice, and records used for proposed finding
- Hold formal meeting on the record, if requested, on reasoning, analysis, and factual basis of proposed finding

3 petitioners**

6a. AS/IA Consideration of Proposed Finding, for Final Determination

Authority: 25 C.F.R. 83.10(g)-(l)

Responsibilities

Petitioner's and Others' Responsibilities:

- Consult with AS/IA to determine timeframe for consideration

AS/IA responsibilities:

- Consult with petitioner and others to determine timeframe for consideration; notify them of date consideration begins
- Consider proposed finding, arguments, evidence, and comments submitted during response period
- Prepare final determination

4 petitioners**

6b. AS/IA Final Determination to Acknowledge or Deny Acknowledgment

Authority: 25 C.F.R. 83.10(g), (l)-(m)

Responsibilities
AS/IA responsibilities:

- Make final determination
- Publish summary of final determination in *Federal Register*

(Petitioner count: see #6a.)

7. Appeal of Final Determination, within Interior Department

Authority: 25 C.F.R. 83.11; 43 C.F.R. 4

Responsibilities

Petitioner's and Interested Parties' Responsibilities:

- File request for reconsideration of final determination with IBIA
- State grounds for reconsideration to IBIA
- Submit briefs and replies to IBIA
- Submit comments to SOI

IBIA, SOI, and AS/IA responsibilities:

- IBIA judges timeliness and grounds for reconsideration, affirms or vacates final determination, sends certain reconsideration requests to SOI, and may in certain cases remand to AS/IA
- SOI determines whether to request reconsideration by AS/IA, receives comments, may review and make available further information, and notifies all parties of decision
- AS/IA provides documents and records to IBIA, reconsiders if so directed, issues reconsidered determination, and publishes notice of reconsidered determination in *Federal Register*

1 petitioner**

8. Litigation of Final Determination in Federal Court

Responsibilities

Petitioner's and Interested Parties' Responsibilities:

- File suit in federal court

SOI, AS/IA, Interior Solicitor, DOI, and DOJ responsibilities:

- Respond to suit in federal court

2 petitioners**

9. Resolved Petitions for Acknowledgment (Not in Litigation)

Acknowledgments:

- by AS/IA through Federal Acknowledgment Process (FAP): 15 petitioning tribes
- by AS/IA confirmation of recognition: 1 petitioning tribe
- by AS/IA determination that petitioner was part of recognized tribe: 1 petitioner
- by Congress through enacted statutes: 8 petitioning tribes

Denials of Acknowledgment:

- by AS/IA through Federal Acknowledgment Process (FAP): 15 petitioning tribes

Other Final Actions:

- Petitions withdrawn through merger or at petitioner's request: 4 petitioners
- Petitioner formally dissolved: 1 petitioner
- Petitioner removed from FAP because not Indian: 1 petitioner

46 petitioners*

Notes to Charts:

Abbreviations:

AS/IA	=	Assistant Secretary–Indian Affairs
BIA	=	Bureau of Indian Affairs
BAR	=	Branch of Acknowledgment and Research, BIA
IBIA	=	Interior Board of Indian Appeals
DOI	=	Department of the Interior
SOI	=	Secretary of the Interior
DOJ	=	Department of Justice

* For a list of Steps 1, 2, and 9 petitioners, see the BIA-BAR's table, "Summary Status of Acknowledgment Cases (as of April 4, 2000)," pp. 4-12.

** Because the charts for Steps 3-8 attempt to follow the steps described in the federal-acknowledgment regulations, they do not follow the BIA-BAR allocation of petitioners shown in its "Summary Status of Acknowledgment Cases (as of April 4, 2000)." Below are lists of the petitioners allocated to Steps 3-8.

Step 3 petitioners:
St. Francis/Sokoki Band of Abenakis (VT), Juaneno Band of Mission Indians (CA) (#84a), Mashpee Wampanoag (MA), Brothertown Indians of Wisconsin, Juaneno Band of Mission Indians (CA) (#84b), Tolowa Nation (CA), Piro/Manso/Tiwa Indian Tribe (NM), Schaghticoke Indian Tribe (CT), Meherrin Tribe (NC), Southern Sierra Miwuk Nation (CA), Muwekma Indian Tribe (CA)

Step 4 petitioners:
Nipmuc Nation (Hassanamisco Band) (MA), Nipmuc Nation (Chaubunagungamaub Band) (MA), Little Shell Tribe of Chippewa Indians (MT), Burt Lake Band of Ottawa and Chippewa Indians (MI), Biloxi Chitimacha Confederation of Muskogees (LA) (amended proposed finding), Point Au Chien Indian Tribe (LA) (amended proposed finding)

Step 5 petitioners:
Steilacoom Tribe (WA), Eastern Pequot Indians (CT), Paucatuck Eastern Pequot Indians (CT)

Step 6 petitioners:
United Houma Nation (LA), Duwamish Indian Tribe (WA), Chinook Indian Tribe/Chinook Nation (WA), Snohomish Tribe (WA)

Step 7 petitioner:
Golden Hill Paugussett Tribe (CT)

Step 8 petitioners:
Miami Nation of Indians (IN), Ramapough Mountain Indians (NJ)

Table 1. Petitioners for Federal Acknowledgment as Indian Tribes: Number and Percent of Petitioners, by Step, April 4, 2000

Step no.	Status (Steps in *italics* require petitioner action.)	Number of petitioners	Percent of petitioners: in subtotal	Percent of petitioners: in total	Date reached step: Earliest	Date reached step: Latest
	Petitions Not Resolved					
1	*Letter of Intent to Petition*	*119*	*62.3%*	*49.8%*	*1976*	*2000*
	Letter of Intent: active petitioner	*103*				
	Letter of Intent: inactive petitioner	*10*				
	Letter of Intent: ineligible petitioner	*6*				
2	*Documentation of Petition*	*47*	*24.6%*	*19.7%*	*1979*	*2000*
3	Documented Petitions Ready for Active Consideration	11	5.8%	4.6%	1996	1998
4	Active Consideration of Petition	6	3.1%	2.5%	1995	1998
5	*Response to Proposed Finding (PF)*	*3*	*1.6%*	*1.3%*	*2000*	*2000*
6	Consideration of PF for Final Determination (FD)	4	2.1%	1.7%	1997	1999
7	Appeal of FD within Interior Department	1	0.5%	0.4%	1996	–
	Subtotal: Petitions Not Resolved	191	100%	79.9%		
8	**Resolved: Litigation vs. FD in Federal Court**	2	–	0.8%	1992	1998
9	**Petitions Resolved, not in litigation**					
	AS/IA FAP: acknowledged	15	32.6%	6.3%	1980	2000
	AS/IA letter: recognition confirmed	1	2.2%	0.4%	1994	–
	AS/IA other: determined part of recognized tribe	1	2.2%	0.4%	1981	–
	Congress: acknowledged/restored	8	17.4%	3.3%	1982	1994
	AS/IA FAP: denied acknowledgment	15	32.6%	6.3%	1981	2000
	AS/IA other: petitions withdrawn; group dissolved; group removed	6	13.0%	2.5%	–	–
	Subtotal: Petitions Resolved	46	100.0%	19.2%		
	Total	239		100%		